# CHAPTER X

# STUDENT FIRST AMENDMENT RIGHTS

## A. U.S. Supreme Court Decisions

In the landmark decision of Tinker v. Des Moines Independent Community School District,[1] the United States Supreme Court held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The Supreme Court held that students had a First Amendment right to freedom of speech in the school setting so long as the speech did not disrupt the educational process or invade the rights of others.

In Tinker, several students wore black armbands to their schools in the Des Moines Independent Community School District in violation of school policy. The students were sent home and suspended from school until they were willing to return to school without their armbands.

The students then filed a complaint in the United States District Court seeking an injunction restraining the school district from disciplining the students. The District Court dismissed the complaint. The Court of Appeals affirmed the District Court's decision without opinion and the United States Supreme Court agreed to hear the matter.

At the outset, the United States Supreme Court noted that the wearing of an armband with the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment.[2] The Court held that the wearing of armbands was closely akin to "pure speech" and that pure speech has repeatedly been held to be entitled to comprehensive protection under the First Amendment. The Court stated:

> "First Amendment rights, applied in the light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost fifty years."[3]

The Court noted that the wearing of armbands did not involve aggressive, disruptive action or even group demonstrations. The Court considered the wearing of armbands to be a silent passive expression of opinion unaccompanied by any disorder or disturbance on the part of petitioners. The Court found there was no evidence that the students interfered with the school's work or the rights of other students to be secure and to be left alone. Therefore, the Court stated, ". . . this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students."[4]

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[1] 393 U.S. 503, 89 S.Ct. 733, 736 (1969).
[2] See, West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178 (1943).
[3] Id. at 506.
[4] Id. at 509.

The Court noted that there was no indication of disruption or threats or acts of violence on school premises as a result of the wearing of the armbands. The Court noted, ". . . undifferentiated fear or apprehension of disturbance was not enough to overcome the right of freedom of expression."[5] The Court further stated:

> "Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument, or cause a disturbance. But our Constitution says we must take this risk . . . and our history says that it is this sort of hazardous freedom – this kind of openness – that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.
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> "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of the public discipline and the operation of the school,' the prohibition cannot be sustained."[6]

The Supreme Court noted that the District Court made no finding of disruption and that the action of school authorities appears to have been based upon an urgent wish to avoid controversy. The Court also noted that school officials did not prohibit the wearing of all symbols of political or controversial significance. The Court noted that the record shows that students in some of the schools wore buttons relating to national political campaigns and other political symbols and that the black armbands opposing the war in Viet Nam were singled out for prohibition. The Court noted that the record did not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption or material interference with school activities and no disturbances or disorders on the school premises in fact occurred.

The Court found that the students did not interrupt school activities or intrude in school affairs or the lives of others. Therefore, school officials were not permitted to deny the students the right to wear the black armband opposing the war in Viet Nam under the Free Speech Clause of the First Amendment.

In later cases, the United States Supreme Court limited the First Amendment rights of students in the school setting. In Bethel School District v. Fraser,[7] the Court upheld the suspension

[5] Id. at 509.
[6] Id. at 510.
[7] 478 U.S. 675, 106 S.Ct. 3159 (1986).

of a student for delivering a speech before a high school assembly in which the student employed elaborate graphic and explicit sexual metaphor. The Court held that the school district acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech.[8] The Court in Fraser held that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.[9] Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected but in school Fraser's First Amendment rights were circumscribed in light of the special characteristics of the school environment.[10]

In Bethel School District v. Fraser,[11] the United States Supreme Court answered many of these questions by holding that a student's speech at a school assembly was not constitutionally protected where it included graphic and explicit sexual metaphor. The Supreme Court noted the role and purpose of the American public school system was to prepare pupils for citizenship in the republic and to inculcate habits and manners of civility and noted that the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings.[12] The United States Supreme Court stated:

> "Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse . . . The inculcation of these values is truly the 'work of the schools' . . . The determination of what manner of speech in the classroom or in the school assembly is inappropriate properly rests with the school board.
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> "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. . . . The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent or offensive speech and conduct such as that indulged in by this confused boy. . . .
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> "We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. Unlike the sanctions imposed on the students wearing armbands in Tinker, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational

[8] Id. at 685.
[9] Id. at 682.
[10] Id. at 682-683.
[11] 106 S.Ct. 3159, 32 Ed.Law Rep. 1243 (1986).
[12] Ibid.

> mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education. . . ."[13]

In Morse v. Frederick,[14] the Supreme Court held that a review of prior cases indicated that educators may regulate some speech even though the government could not censure similar speech outside the school.[15] The Court further noted that the principles applied in the student speech cases had been applied in the Fourth Amendment context and noted that the school setting requires some easing of the restrictions with respect to the searches of students.[16]

In Morse, the Supreme Court held that the principal acted reasonably in confiscating a banner that the principal believed promoted illegal drug use in violation of established school policy. The Court noted that if the principal had failed to act it would send a powerful message to the students about how serious the school was about the dangers of illegal drug use. The Court stated, "The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers."[17] The Court did not make a specific finding of disruption.

In Morse v. Frederick,[18] the United States Supreme Court held that a school district did not violate the First Amendment rights of a student when it confiscated a banner from the student that stated, "BONG HITS 4 JESUS." The Court held that the principal's interpretation that the banner conveyed a pro-drug message justified the principal's action of confiscating the banner during a school-sponsored activity.

In California, the applicability of the Morse decision is unclear due to the Legislature's enactment of Education Code sections 48907 and 48950 which may grant broader free speech rights to students. As discussed below, school districts should consult with legal counsel when student free speech issues arise.

On January 24, 2002, the Olympic Torch Relay passed through Juneau, Alaska, on its way to the winter games in Salt Lake City. The torchbearers were to proceed along a street in front of Juneau-Douglas High School while school was in session. The school principal decided to permit staff and students to participate in the torch relay as an approved social event or class trip. Students were allowed to leave class to observe the relay from either side of the street. Teachers and administrative officials monitored the students' actions.[19]

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[13] Bethel at 3165-3166 (1986). See, also, Chandler v. McMinnville School District, 978 F.2d 524, 529 (9th Cir. 1992).
[14] 127 S.Ct. 2618 (2007).
[15] Id. at 2627.
[16] Id. at 2627-2628; citing Vernonia School District 47J v. Acton, 515 U.S. 646, 655-656, 115 S.Ct. 2386 (1995); New Jersey v. TLO, 469 U.S. 325, 340, 105 S.Ct. 733 (1985); Board of Education v. Earls, 536 U.S. 822, 829-830, 122 S.Ct. 2559 (2002).
[17] Id. at 2630.
[18] 127 S.Ct. 2618 (2007).
[19] Id. at 2622.

Joseph Frederick was late to school that day. When he arrived, he joined his friends across the street from the school to watch the event. As the torchbearers and camera crews passed by, Frederick and his friends unfurled a 14-foot banner bearing the phrase: "BONG HITS 4 JESUS." The large banner was easily readable by the students on the other side of the street.[20]

Principal Morse immediately crossed the street and demanded that the banner be taken down. Everyone but Frederick complied. Morse confiscated the banner and told Frederick to report to her office, where she suspended him for 10 days. Morse later stated that she told Frederick to take the banner down because she thought it encouraged illegal drug use, in violation of established school policy.[21]

The Court rejected the student's argument that the event was not a school activity. The Court held that the event occurred during normal school hours and was sanctioned by the principal as an approved social event or class trip and the school district's rules expressly provide that pupils at approved social events and class trips are subject to district rules for student conduct. Teachers and administrators were interspersed among the students and charged with supervising them. The high school band and cheerleaders performed. Frederick, standing among the other students across the street from the school, directed the banner towards the school, making it plainly visible to most students. Under these circumstances, the Court held that the event was a school-sponsored activity.[22]

The Court rejected the student's argument that the statement on the banner did not promote illegal drug use. The Court held that the principal reasonably interpreted the message on the banner as promoting illegal drug use and that her interpretation was plainly a reasonable one. The principal believed that the display of the banner would be construed by students as approving the smoking of marijuana.[23] The Court stated:

> "At least two interpretations of the words on the banner demonstrate that the sign advocated the use of illegal drugs. First, the phrase could be interpreted as an imperative: '[Take] bong hits. . .'- a message equivalent, as Morse explained in her declaration, to 'smoke marijuana' or 'use an illegal drug.' Alternatively, the phrase could be viewed as celebrating drug use – 'bong hits [are a good thing],' or '[we take] bong hits' – and we discern no meaningful distinction between celebrating illegal drug use in the midst of fellow students and outright advocacy or promotion."[24]

The Court further stated:

> "The question thus becomes whether a principal may, consistent with the First Amendment, restrict student speech at a

[20] Ibid.
[21] Id. at 2622-23.
[22] Id. at 2624.
[23] Ibid.
[24] Id. at 2625.

> school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may."[25]

The Court held that the special characteristics of the school environment and the governmental interest in stopping student drug abuse allow schools to restrict student expression that they reasonably regard as promoting illegal drug use.[26]

The Court concluded by stating:

> "School principals have a difficult job, and a vitally important one. When Frederick suddenly and unexpectedly unfurled his banner, Morse had to decide to act – or not act - on the spot. It was reasonable for her to conclude that the banner promoted illegal drug use – in violation of established school policy – and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers."[27]

It is unclear how the Morse decision will affect school districts in California. In 1992, the Legislature enacted Education Code section 48950.[28] Section 48950(a) states:

> "School districts operating one or more high schools and private secondary schools shall not make or enforce any rule subjecting any high school pupil to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside of the campus, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution."

There has been no case law interpreting Education Code section 48950(a). The statute states that a school district shall not enforce any rule subjecting any high school student to disciplinary sanctions for speech or other communication that when engaged in outside of the campus is protected from governmental restriction.

Section 48950(e) states that nothing in Section 48950 supersedes, limits or modifies Education Code section 48907 which allows the regulation of student speech which is libelous, slanderous, obscene or which so incites students as to create a clear and present danger of the substantial disruption of the orderly operation of the school. However, in Morse, the United States Supreme Court made it clear that since the student, Joseph Frederick, was attending a school event,

[25] Id. at 2625.
[26] Id. at 2629.
[27] Id. at 2629.
[28] Stats. 1992, ch. 1363 (SB 1115).

the school district could restrict him from promoting illegal drug use. However, outside of school the student would be free to advocate illegal drug use. Therefore, it is unclear whether Education Code sections 48907 and 48950(a) were intended to grant broader rights to California students and allow students to promote illegal drug use on a school campus if it does not cause a clear and present danger of substantial disruption of the orderly operation of the school.

Since it is unclear whether Sections 48907 and 48950 were intended to grant such broad rights to students, we would advise districts to consult with legal counsel when these situations arise.

## B. Student Walkout

Under Tinker, the courts are not required to wait until disruption occurs.[29] In Karp v. Becken, the Ninth Circuit Court of Appeals held that school officials have a duty to prevent the occurrence of disturbances and that Tinker does not demand certainty that disruption will occur, but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption.[30] In Karp, the student filed an action against school officials who suspended the student for five days for planning a walkout at an athletic awards ceremony which was to be held at the high school in order to protest the refusal of the school to renew the teaching contract of an English instructor. The student gave notice of the plans to the news media the day before it was to occur resulting in an article about the planned walkout in the morning newspaper on the day of the assembly.

Before the ceremony began, school officials were told by student body officers that if a walkout did take place, a number of school athletes would likely attempt to prevent the walkout. Fearing a possibly violent confrontation, school officials cancelled the assembly. Despite the cancellation, some students staged a walkout from classes.[31]

As part of his efforts to publicize a demonstration to be held later in the morning, the student again notified the news media. During the lunch hour, students and the news media gathered in the area of the school's multi-purpose room. At one point, the student went out to his car in the parking lot and brought back signs supporting the English instructor and distributed them to other students. The Vice Principal ordered the students to surrender their signs, claiming they were not permitted to have the signs at school. There was no specific rule prohibiting the bringing of signs on campus.[32]

All of the signs were given to the school administrator except the plaintiff's sign. The student asserted a constitutional right to possess and distribute the signs. When asked a second time, the student gave up the signs and then accompanied the Vice Principal to the office. While the student was in the administrative office, students began chanting and pushing and shoving developed between the demonstrators and some student athletes. Shortly after intervention by school officials, the demonstration broke up.[33]

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[29] Karp v. Becken, 477 F.2d 171 (9th Cir. 1973).
[30] Id. at 275.
[31] Id. at 173.
[32] Id. at 173.
[33] Id. at 173.

A couple of days later, after a consultation with the student's parents, school officials advised the plaintiff that he was to be suspended for five days. School officials then offered to reduce the suspension to three days if the plaintiff would agree to refrain from bringing similar signs on the campus. The student refused.[34]

The court in Karp noted that, "The Tinker rule is simply stated; application, however, is more difficult."[35] The court noted that there were a number of facts in the case that justified a reasonable forecast of material interference with the school's work:

1. On the morning involved, there was a newspaper article relating to the planned assembly walkout. The article indicated that the newspaper's source of information was a reporter's conversation with the student.

2. The high school Principal and other school officials testified that the school athletes had threatened to stop the proposed demonstration.

3. The assembly was cancelled because school officials feared a walkout might provoke violence.

4. Later in the morning, newsmen appeared on the campus and set up their equipment. During this time, appellant and other students, during a free period, were milling around outside the building talking with these newsmen.

5. The Vice-Principal testified to his impression that there was a general atmosphere of excitement and expectation pervading the campus and classrooms. There was an intense feeling something was about to happen.

6. Some students actually walked out from class, notwithstanding the cancellation of the assembly.

7. About the time when the assembly walkout would have occurred, someone pulled the school fire alarm, which, had it not been previously disconnected by the Vice-Principal, would have emptied every room in the entire school.

8. Approximately fifty students gathered in the area of the multi-purpose room who talked among themselves and with news media personnel.

9. Excited by the situation, twenty to thirty of the junior high students who share facilities with the high school and who were eating at the high school cafeteria during their lunch period, interrupted their lunch

[34] Id. at 174.
[35] Id. at 174.

and ran in the area of the multi-purpose room to watch the group of students and news people gathered there. The junior high students ran about the group excitedly and, as a result, their supervisors determined their lunch period should be shortened and they were returned to their classrooms earlier than usual.

10. Appellant went to the school parking lot and took the signs from his car to the area where the students had congregated near the multi-purpose room and proceeded to distribute them.[36]

The Court of Appeals held that given the above facts, school officials were justified in taking the signs from the students. However, the court found that while school officials may curtail the exercise of First Amendment rights when they reasonably forecast material interference or substantial disruption, there must be additional justification before a student may be disciplined. If school officials could show that the student violated a statute or school rule, then school officials could discipline the student but in Karp, the court ruled that the school district failed to show that a statute or school rule had been broken.[37]

## C. Wearing of Buttons

In Chandler v. McMinnville,[38] the Ninth Circuit Court of Appeals held that the school district failed to present any evidence that students who wore "SCAB" buttons to protest replacement teachers during a teacher strike were disruptive. Therefore, the Court held that the students could proceed with their First Amendment claim alleging that they had been unconstitutionally punished in violation of the First Amendment.

The Court of Appeals noted that public schools prepare children for citizenship and the proper exercise of the First Amendment is a hallmark of citizenship in our country. Nevertheless, the court held that the First Amendment has its limitations in the public school setting and that the First Amendment rights of public school students are not automatically coextensive with the rights of adults in other settings.[39]

The Court of Appeals noted that ". . . student preparation for adult experiences does not necessarily ensure adult experiences on the school campus."[40] For example, the Court of Appeals noted that schools are not required to tolerate student speech that is inconsistent with the school's basic educational mission.[41]

The Court of Appeals in Chandler analyzed the Supreme Court decisions in Tinker, Fraser, and Kuhlmeier and determined that there were three distinct areas of student speech:

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[36] Id. at 175–176.
[37] Id. at 176–177.
[38] 978 F.2d 524 (9th Cir. 1992).
[39] Id. at 528; citing Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 266, 108 S.Ct. 562, 567 (1988); Bethel School District No. 403 v. Fraser, 478 U.S. 675, 682, 106 S.Ct. 3159, 3163-64 (1986).
[40] Id. at 527.
[41] Id. at 528.

1. Vulgar, lewd, obscene and plainly offensive speech,

2. School-sponsored speech, and

3. Speech that falls into neither of these categories.[42]

The Court of Appeals held that the standard for reviewing the suppression of vulgar, lewd, obscene and plainly offensive is governed by Fraser, that school-sponsored speech is governed by Kuhlmeier, and all other speech is governed under the standards of Tinker. The Court of Appeals held that school officials may suppress vulgar, lewd, obscene, and plainly offensive speech when that speech is inconsistent with the basic educational mission of the school, without showing that such speech occurred during a school-sponsored event or threatened to substantially disrupt or substantially interfere with the school's work. Such language, by definition impinges upon the rights of other students and therefore its suppression is reasonably related to legitimate pedagogical concerns.[43]

The Court of Appeals in Chandler held that when students engage in speech that might reasonably be perceived as being sponsored or bearing the imprimatur of the school, school officials are entitled to greater control over that expression. The Court of Appeals held that under such circumstances the school has the discretion to disassociate itself from an entire range of speech, including speech that is ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.[44]

The third category of speech involves speech that is neither vulgar, lewd, obscene, or plainly offensive, nor school-sponsored speech. To suppress speech in this category, school officials must justify their decision by showing facts that might reasonably have led school authorities to forecast substantial disruption of, or material interference with, school activities. However, the First Amendment does not require school officials to wait until disruption actually occurs since school officials have a duty to prevent the occurrence of disturbances.[45]

The Court of Appeals in Chandler then reviewed the facts alleged in the case and found that school officials made no attempt to suppress all the buttons that were worn by the student but only those buttons containing the word "SCAB". The court noted that the word "SCAB" in this context means a worker who accepts employment or replaces a union worker during a strike. Although the court found the word "SCAB" insulting in this context, the court did not find the buttons to be vulgar, lewd, obscene, or plainly offensive within the meaning of Fraser. Therefore, the buttons did not fall within the first category of speech, nor did the court find that the buttons fell within the second category of speech (i.e., school-sponsored speech).

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[42] Id. at 529; see, also, Jacobs v. Clark County School District, 526 F.3d 419 (9th Cir. 2008), in which the Court of Appeals held that the First Amendment is not violated when the school district adopts a school uniform policy that is neutral on its face. The court held that viewpoint neutral school uniform policies should be analyzed with ". . . a different level of scrutiny . . ." than in Tinker, Bethel, and Hazelwood where student speech was regulated based on its content.

[43] Id. at 530; citing Bethel School District No. 403 v. Fraser, 478 U.S. 675, 106 S.Ct. 3159 (1986).

[44] Ibid.; citing Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562 (1988).

[45] Ibid.; citing Tinker v. Des Moines Independent School District, 393 U.S. 583, 514 (1969); Karp v. Becken, 477 F.2d 171, 175 (9th Cir. 1973).

The Court of Appeals held that whether the "SCAB" buttons were properly suppressed because school officials reasonably forecasted that they would substantially disrupt or materially interfere with school activities was not shown in the record. The court held that the buttons were not inherently disruptive and remanded the matter back to the District Court to determine whether the school district may be able to meet the reasonable forecast of substantial disruption test.[46] The Court of Appeals noted that after trial or summary judgment, the record might support the school district's position that the buttons were substantially disruptive.[47]

## D. Distribution of Leaflets

In M.A.L. v. Kinsland,[48] the Sixth Circuit Court of Appeals held that a school district may regulate the distribution of leaflets in school hallways as a reasonable time, place and manner restriction. The court held that hallways in a public middle school were a nonpublic forum. The court also held that the policy requiring prior approval for distribution of any literature was reasonable.

The court held it was a reasonable time, place and manner regulation of student speech to require a student to post his leaflets on hallway bulletin boards and to distribute them during lunch hour from the cafeteria table, rather than handing them out in the hallway between classes. The Court of Appeals noted that a public middle school is not a public forum, and that school authorities had done nothing to indicate that Jefferson Middle School hallways had been open for indiscriminate use by the public.[49]

The Court of Appeals held that it is reasonable for the school to require prior approval before permitting students to distribute literature, the school district's distribution policy is viewpoint and content neutral and it provides clear standards against which the principal must exercise his discretion to approve or disapprove of a proposed distribution.[50]

The Court of Appeals indicated that a school district may impose time, place and manner restrictions on the distribution of literature and is not required to show that the materials' content would cause a material and substantial interference with the operation of the school.[51]

The Court of Appeals stated:

> "Time, place and manner restrictions may be enforced in a traditional public forum, so long as they are content neutral, and narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[52]

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[46] Id. at 531.
[47] Id. at 532.
[48] 543 F.3d 841, 237 Ed.Law Rep. 587 (6th Cir. 2008).
[49] Id. at 847. See, also, Muller v. Jefferson Lighthouse School, 98 F.3d 1530, 1539-40 (7th Cir. 1996).
[50] Id. at 847-848.
[51] Id. at 849.
[52] Id. at 850. See, also, Perry Education Association v. Perry Local Educators Association, 460 U.S. 37, 35, 103 S.Ct. 938 (1983).

The Court noted that school districts had an interest in regulating the time, place and manner of the distribution of the materials to reduce tardiness, avoid congestion in the hallways and excessive trash on the floor.

In Morgan v. Plano Independent School District,[53] the Fifth Circuit Court of Appeals upheld the school district's rules for student distribution of written materials. The 2005 Policy permits distribution of materials:

1. 30 minutes before and after school;

2. At three annual parties;

3. At recess; and

4. During school hours, but only passively at designated tables.[54]

Students are generally prohibited from distributing material at all other times and places. In addition, middle and secondary school students are permitted to distribute materials in the hallways during noninstructional time and in the cafeterias during noninstructional time and designated lunch periods. The 2005 Policy also contained narrow limitations on the contents of materials that may be distributed.[55]

The 2005 Policy bans materials that are:

1. Obscene, vulgar, or otherwise age-inappropriate;

2. Endorse actions endangering the health or safety of students;

3. Advocates violation of school rules;

4. Advocates imminent lawlessness;

5. Contains hate speech; and

6. Reasonably could result in material and substantial interference with any school, education and/or curricular related activity or that blocks or impedes the safe flow of traffic within hallways and entrances or exits of the school.[56]

At a public hearing the school board heard testimony from various employees regarding its necessity. The preamble to the Policy states that the Policy is intended to decrease distractions, decrease disruption, to increase the time available and dedicated to learning, and to improve the

[53] 589 F.3d 740 (5th Cir. 2009).
[54] Id. at 743.
[55] Ibid.
[56] Id. at 743, n. 2.

educational process, environment, safety and order at District schools and not invade or collide with the rights of others. The additional restrictions on elementary students are intended to facilitate the safe, organized and structured movements of students between classes and at lunch, as well as to reduce littering.[57]

The Plaintiff made a motion for summary judgment that the policies were facially invalid under the First Amendment. The district court concluded that the Policy was narrowly tailored to achieve the significant governmental interest of improving the educational process, while leaving open ample alternative channels of communication.[58]

The Court of Appeals held that, time, place and manner is the proper standard for evaluating content and viewpoint neutral regulations of student speech and that when a school imposes content or viewpoint based restrictions the court will apply Tinker.[59] In this respect, a regulation must be content and viewpoint neutral, must be narrowly tailored to serve a significant government interest and leave open ample alternative channels for communication of the information. The regulation need not be the least restrictive alternative, but it must avoid burdening substantially more speech than is necessary to achieve the government's interest.[60]

Applying the time, place and manner test, the Court of Appeals concluded that the district's 2005 Policy was reasonable and facially constitutional and held that the regulations at issue were content neutral and the District had a significant legitimate interest that is furthered by the regulations. The regulations were aimed at providing a focused learning environment for its students. The Court of Appeals also found that the policy as written was sufficiently narrowly tailored and constitutional. The Policy also provides ample alternative channels of communication. The Court of Appeals concluded that the 2005 Policy was facially constitutional.[61]

## E. Pledge of Allegiance

The U.S. Supreme Court has held that schools may not require students to salute the American flag or say the Pledge of Allegiance.[62] Since the U.S. Supreme Court decision, a number of federal courts have held that school districts cannot require students who decline to salute the flag to stand for the flag salute.[63]

The courts have held that a child's refusal to stand for the Pledge of Allegiance was a form of expression and, therefore, school districts could not require students to stand for the Pledge of Allegiance. The courts have also held that even if a student's refusal to stand for the flag salute has

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[57] Id. at 743-44.
[58] Id. at 744. Canady v. Bossier Parish School Board, 240 F.3d 437, (5th Cir. 2001); United States v. O'Brien, 391 U.S. 367 (1968).
[59] Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969).
[60] Id. at 746; Citing Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).
[61] Id. at 747-49.
[62] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).
[63] Goetz v. Ansell, 477 F.2d 636 (2nd Cir. 1973); Sheldon v. Fannin, 221 F.Supp. 766 (D.Ariz. 1963); Fran v. Baron, 307 F.Supp. 27 (E.D.N.Y. 1969); Freedom From Religion Foundation v. Hanover School District, 626 F.3d 1, 262 Ed.Law Rep. 106 (1st Cir. 2010).

persuaded others to take the same action, the school district cannot require the student to stand for the flag salute.[64]

In addition, the courts have held that a student's exposure to recitation of the Pledge of Allegiance does not violate the student's or parents' rights under the First Amendment's Free Exercise Clause. The courts have held that public schools are not obliged to shield individual students from ideas which potentially are offensive to the student's beliefs and that the First Amendment rights of the parents are not violated since the parents may instruct the child differently.[65]

## F. Computer "Hacking" Article

The question of what constitutes reasonable forecast of disruption was addressed by the Seventh Circuit Court of Appeals in Boucher v. School Board of the School District of Greenfield.[66] In Boucher, a high school student was expelled after the student wrote an article about how to "hack" into the school's computers in an underground newspaper. The article described in detail the procedure for accessing various files in the school's computer system. As a result of the student's article, the school district was required to retain the services of computer experts to conduct four hours of diagnostic tests on the school's computer system and change all the passwords mentioned in the article.[67]

The Court of Appeals noted that in the case of student expression, the relevant test is whether school authorities have reason to believe that the expression would be disruptive (i.e., whether there are facts which might reasonably have led school authorities to forecast substantial disruption or material interference with school activities).[68] The Court of Appeals noted that the article was a blueprint for the invasion of the school district's computer system along with encouragement to others to do so.[69] The Court of Appeals found that the school district was likely to succeed on the merits and vacated the student's preliminary injunction obtained at the District Court level.

## G. False Information

In Doninger v. Niehoff,[70] the Second Circuit Court of Appeals upheld the actions of the school district when it prohibited a student from running for senior class secretary based on off-campus internet speech. The student had posted false and incorrect information on the Internet about an upcoming student event which caused potential disruption to the school.

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[64] Hanover v. Northrup, 325 F.Supp. 170, 173 (D.Conn. 1970).
[65] Freedom From Religion Foundation v. Hanover School District, 626 F.3d 1, 14 (1st Cir. 2010); Parker v. Hurley, 514 F.3d 87, 103 (1st Cir. 2008).
[66] 134 F.3d 821 (7th Cir. 1998).
[67] Id. at 827.
[68] Id. at 827.
[69] Id. at 828.
[70] 527 F.3d 41, 233 Ed.Law Rep. 30 (2nd Cir. 2008).

Doninger was both on the student council and serving as the junior class secretary at Lewis S. Mills High School in Burlington, Connecticut. The school district had in place a policy regarding eligibility to represent its schools in such positions. The district's policy stated:

> "All students elected to student offices, or who represent their schools in extracurricular activities, shall have and maintain good citizenship records. Any student who does not maintain a good citizenship record shall not be allowed to represent fellow students nor the school for a period of time recommended by the student's principal, but in no case, except when approved by the board of education, shall the time exceed twelve calendar months."[71]

The high school student's handbook also required that students maintain a continuous communication channel from students to both faculty and administration and required good citizenship. While on the student council, Doninger and other student council members helped plan an event called "Jamfest," an annual concert.[72]

Jamfest was scheduled to take place in the school's new auditorium on Saturday, April 28, 2007, but shortly before the date of the event, the school's administrators learned that the teacher responsible for operating the auditorium's sound and lighting equipment would be unable to attend on that day. As a result, at an April 24 student council meeting, the students were informed that Jamfest could not be held in the auditorium without the teacher and that they had the option to either keep the scheduled date and hold the event in the cafeteria or find a new date. This announcement upset Doninger and her fellow organizers who wanted to hold the event in the auditorium that weekend as planned. The student council's faculty advisor recommended that they discuss the situation with the school's principal and she accompanied them to the principal's office. They were unable to see the principal immediately, but Doninger volunteered to return to the principal's office during her study hall to help schedule a meeting for later in the day.[73]

Prior to the meeting with the principal, Doninger decided to take immediate action. From the high school's computer lab, Doninger and several other students gained access to the e-mail account of the father of one of the students. Using that account, the students sent a mass e-mail alerting parents, students, and others that the central office had decided that the student council could not hold its annual Jamfest in the auditorium and urging them to contact the central office and ask that they be allowed to use the auditorium. The school e-mail policy specifically restricted access and their mass e-mail violated that policy. As a result of the mass e-mail, the principal and the school district superintendent received numerous calls and e-mails regarding Jamfest.[74]

Later that day, the principal saw Doninger in the hallway at school and spoke to her about the mass e-mail. The principal told Doninger that the information in the e-mail was incorrect, that the

[71] Id. at 43.
[72] Id. at 44.
[73] Id. at 44-45.
[74] Id. at 45.

Jamfest had not been cancelled, but could either be rescheduled to another day or take place in the cafeteria on the same day.[75]

That night, from her home, Doninger posted a message on a publicly accessible blog stating that "Jamfest is cancelled due to douchebags in central office." The next morning, the principal and the superintendent received numerous phone calls and e-mails regarding Jamfest, as well as personal visits from students. The principal and superintendent missed or arrived late to several school-related activities as a result of the controversy.[76]

On May 17, 2007, Doninger met with the principal and the principal confronted Doninger about the blog post and requested that Doninger apologize to the superintendent, show the blog entry to her mother, and withdraw her candidacy for senior class secretary. Doninger agreed to comply with the first two requests, but did not agree to withdraw her candidacy for senior class secretary. The principal then refused to allow Doninger to run for senior class secretary, but allowed Doninger to retain her current position as junior class secretary. The principal decided that Doninger's name would not appear on the election ballot, nor would she be permitted to give a campaign speech at a May 25 school assembly regarding the election. Doninger was not otherwise disciplined for her blog post.[77]

On May 25, 2007, Doninger planned to wear a t-shirt that said, "Vote for Avery" to the election assembly where candidates were to give speeches before approximately 600 of their fellow students. The principal instructed Niehoff and other students to remove the t-shirt before entering the auditorium for the election assembly stating that it would be disruptive to the assembly. The principal did not make an effort to prevent students from wearing the t-shirts other than at the election assembly.[78]

Doninger was permitted to enter the auditorium without wearing the t-shirt, but instead wore a t-shirt that stated "RIP Democracy." Even though Doninger was not on the ballot, Doninger received a plurality of the votes for the position. The principal, however, in accordance with her earlier decision, awarded the position of senior class secretary to the student who received the next highest number of votes.[79]

The Court of Appeals noted that while students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate, the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.[80] Instead, student First Amendment rights must be applied in a manner consistent with the special

[75] Ibid.
[76] Id. at 45-46.
[77] Id. at 46.
[78] Ibid.
[79] Ibid.
[80] See, Tinker v. Des Moines Independent Community School District, 89 S.Ct. 733 (1969); Bethel School District v. Fraser, 106 S.Ct. 3159 (1986).

characteristics of the school environment. Therefore, school administrators may prohibit student expression that will materially and substantially disrupt the work and discipline of the school.[81]

The Court of Appeals held that Doninger's First Amendment rights were not violated when she was told that she could not run for senior class secretary due to her blog posting and that her First Amendment rights were not violated when she was told to remove the t-shirt before entering the election assembly. The Court of Appeals found that Doninger's blog post directly pertained to an event at the high school and it was reasonably foreseeable that Doninger's post would reach school property and have disruptive consequences.[82]

The Court of Appeals stated:

> "Similarly, Doninger's discipline extended only to her role as a student government representative; she was not suspended from classes or punished in any other way. . . . Here, however, pursuant to Tinker and its progeny, it was objectively reasonable for school officials to conclude that Doninger's behavior was potentially disruptive of student government functions (such as the organization of Jamfest) and that Doninger was free to engage in such behavior while serving as a class representative – a representative charged with working with these very same school officials to carry out her responsibilities."[83]

## H. Confederate Flag

In West v. Derby Unified School District,[84] the Tenth Circuit Court of Appeals upheld a school district's policy prohibiting the wearing or the displaying of the Confederate flag. In West, the school district suspended a seventh grade student at Derby Middle School for three days after the student drew a Confederate flag on a piece of paper during math class in violation of the district's policy. The student alleged that the school district's policy violated his First Amendment free speech rights and was unconstitutionally vague and overbroad.

The District Court held that the school district's policy did not violate the First Amendment because school officials had evidence from which they could reasonably conclude that the possession

[81] Id. at 48.
[82] Id. at 48-50.
[83] Id. at 52.
[84] 206 F.3d 1358, 143 Ed.Law Rep. 43 (10th Cir. 2000). See, also, Scott v. School Board of Alachea County, 324 F.3d 1246, 175 Ed.Law.Rep. 88 (11th Cir. 2003). In Scott, the Court of Appeals upheld a school's ban on the displaying of a Confederate flag on school premises and the discipline of the student for displaying the Confederate flag. The Court of Appeals held that the student's First Amendment free speech rights were not violated because school officials presented evidence of racial tensions existing at the school and provided testimony regarding fights which appeared to be racially based in the months leading up to their actions. Therefore, the Court of Appeals concluded that school administrators did not violate the student's constitutional rights by banning the display of Confederate flags on school grounds and subsequently enforcing the ban by suspending the student.

and display of Confederate flag images, when unconnected to any legitimate educational purpose, would likely lead to a material and substantial disruption of school discipline.[85]

The District Court made specific findings that prior to the student's suspension several verbal confrontations occurred between black and white students at Derby High School. Some white students wore shirts bearing the image of the Confederate flag while some black students wore shirts with an "X" denoting support for the teachings of Malcolm X. Members of several white supremacy groups became active off campus circulating material to students encouraging racism. Racist graffiti began appearing on the campus in bathrooms and on walls and sidewalks. School officials received reports of racial incidents on school buses and at football games. At least one fight broke out as a result of a student wearing a Confederate flag headband. The Derby Middle School also had a few incidents.[86]

In response to the incidents at Derby High School and Derby Middle School, the school board organized a task force comprised of parents, teachers, and other community members to propose a course of action for the school district. The task force recommended the adoption of a racial harassment policy to help alleviate the problem. The school district subsequently adopted the racial harassment and intimidation policy which prohibited district employees and students from wearing clothing or displaying articles, materials or publications that refer to any racial hate groups, including Confederate flags and black power. The policy resulted in a marked decline of incidents of racial harassment and discord in the school district.[87]

The student in question had previously been disciplined for calling a minority student a racist name and school administrators reviewed the district policy with the student. The student then drew a Confederate flag on a piece of paper at the prompting of another student and was referred to the assistant principal. The assistant principal discussed the matter with the student and considered the prior incident, the prior review of the policy with the student, the fact that the student intentionally violated the policy, that the student displayed the drawing of a Confederate flag to another student, and that other students warned the student not to draw the Confederate flag.[88]

Based on these facts, the Court of Appeals held that the school district did not violate the student's First Amendment rights to free speech and noted that under Tinker where school authorities reasonably believed that a student's uncontrolled exercise of expression might substantially interfere with the work of the school or impinge upon the rights of other students, the school district may prohibit such expression.[89]

The Court of Appeals noted that there was substantial evidence of past events that led school officials to believe that a student's display of the Confederate flag might cause substantial disruption and interfere with the rights of other students to be secure and left alone. As a result of the racial tensions in the school district which threatened to disrupt the educational process, school officials

[85] Id. at 1361-62.
[86] Id. at 1361-63.
[87] Id. at 1362.
[88] Id. at 1362-63.
[89] Id. at 1365-57.

approved a racial harassment and intimidation policy. The history of racial tension in the district led to concern by school administrators and parents that a future substantial disruption might occur if a student displayed a Confederate flag at school. The court held that the school district had a reasonable basis for forecasting substantial disruption from the display of a Confederate flag at school and ruled that its prohibition was therefore permissible.

The Court of Appeals held that the fact that the student's conduct may not have resulted in an actual disruption of the classroom did not mean that the school had no authority to act. The court held that the district had the power to act to prevent problems before they occurred and that it was not limited to prohibiting and punishing conduct only after it caused a disturbance.[90]

In B.W.A. v. Farmington R-7 School District,[91] the Eighth Circuit Court of Appeals upheld the school district's ban on the wearing of clothing depicting the Confederate flag symbol. The Court of Appeals held the school district did not violate the First Amendment Rights of the students.

The Court of Appeals found that there was ample evidence in the record to show that there had been a history of racial incidents occurring in the school district, or in the local community. In the first incident, a white student urinated on a black student. As a result, the black student withdrew from school and moved to another district. A second incident occurred when white students showed up at a black student's home. One of the students was carrying an aluminum baseball bat. The students made racial comments, and when the black student's mother tried to separate the students, one of the white students struck her in the eye. A fight ensued, involving her son and the white students. Later, people drove around the black student's home screaming racial epithets and threatening to burn down the home. A few days later, a group of white students surrounded the same black student and confronted him in Farmington High School. As a result, the black student withdrew from school, and his family moved out of the school district.[92]

A third incident occurred during a basketball tournament hosted by the Central School District, when a heated confrontation erupted during a game with Festus Senior High School. During the game, a skirmish broke out between two Farmington High School players who allegedly used racial slurs against two black players from Festus. Shortly after the incident, the two Festus students filed a complaint with the Missouri State High School Activities Association, complaining that the two Festus students were the victims of racial slurs throughout the game with Farmington High. In that same time period, supporters of the Festus students distributed fliers accusing school administrators of not doing anything to prevent or stop the racial slurs. The flier also noted that the Confederate flag was hanging in the hallway near the locker rooms during the game. The Festus students also reported the incident to the United States Department of Justice, Office of Civil Rights, which conducted an investigation. As a result of the incident, the two teams no longer play each other, unless required to by their athletic conference.[93]

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[90] Id. at 1367-68.
[91] 554 F.3d 734 (8th Cir. 2009).
[92] Id. at 736.
[93] Ibid.

Following these incidents, the district superintendent, relying on his authority to prevent disruption to the education of high school students, banned students from wearing clothing that depicted the Confederate flag. The superintendent based his decision on the belief that the incidents within the district were race related.[94]

After the district banned clothing depicting the Confederate flag, additional racial incidents occurred prior to the 2006-2007 school year, including a white student drawing swastikas and writing "White Power" song lyrics in his notebook. Additionally, school officials punished students for making racial slurs.[95]

During the 2006-2007 school year, B.W.A. wore a baseball cap to school bearing the Confederate flag with the words "C.S.A., Rebel Pride 1861" written on it. The next day B.W.A. wore a t-shirt and belt buckle containing an image of the Confederate flag and the words "Dixy Classic." An assistant principal at Farmington High School requested that he remove the items. When B.W.A. refused, the assistant principal suspended B.W.A. for the remainder of the day. That same day B.W.A. withdrew from school.[96]

After B.W.A. withdrew from Farmington High School, parents and other community members began gathering across the street from the school, protesting and displaying a Confederate flag. Some students believed that these protests increased the racial tension inside of Farmington High School. Students complained to the principal that they felt that the Confederate flag was offensive and would lead to more disruptive behavior. Farmington High School was also subjected to racial vandalism and property damage. These events resulted in the district permitting a black student to leave Farmington High School because he was uncomfortable during the racial tension.[97]

Approximately four months later, another student wore a shirt to school depicting an image of the Confederate flag and the words "The South Was Right. Our School Is Wrong." The other student was suspended for the rest of the day, for refusing to remove his shirt. As a result of the suspensions, B.W.A. filed a claim under 42 U.S.C. Section 1983 alleging the district and its school officials violated his First Amendment rights. The district filed a Motion for Summary Judgment which was granted by the district court.[98]

The Court of Appeals affirmed the district court decision. The Court of Appeals held that under Tinker v. Des Moines Independent School District,[99] school administrators must demonstrate facts that might reasonably lead them to forecast substantial disruption or of material interference of school activities before prohibiting a particular expression of opinion. The Court of Appeals held that in the present case, the school district had shown sufficient evidence to forecast disruption. The

[94] Id. at 736-737.
[95] Id. at 737.
[96] Ibid.
[97] Ibid.
[98] Id. at 737-738.
[99] 393 U.S. 503, 514, 89 S.Ct. 733 (1969).

Court of Appeals held that no court has required school administrators to wait for an actual disruption before acting.[100] The Court of Appeals stated:

> "We believe that this case contains sufficient evidence beyond ordinary discomfort and unpleasantness of unpopular viewpoints. The record in this case contains evidence of likely racially motivated violence, racial tension and other altercations, directly related to adverse race relations in the community and the school. Tinker is satisfied. Because the school could reasonably forecast a substantial disruption, the administration did not violate the First Amendment by banning the flag."[101]

The Court of Appeals concluded that looking at all of the evidence presented to the lower court, the fifteen to twenty minority students at the school were subjected to racial tension from the white majority student and community population, sufficient to motivate some to withdraw from the school. The court held that this could hardly be considered an environment conducive to educational excellence and that racial tension can devolve to violence suddenly. Where race-related violence or excessive racial tension forces minority students to leave the school, schools may act proactively by banning the Confederate flag and taking other necessary measures.[102]

## I. American Flag

In Dariano v. Morgan Hill Unified School District,[103] the Ninth Circuit Court of Appeal held that students' constitutional rights to freedom of expression, due process, or equal protection were not violated when school officials asked the students to remove clothing bearing the images of the American flag after school officials learned of threats of race-related violence during a school-sponsored celebration of Cinco de Mayo.

Live Oak High School, which had dealt with gang-related and racially-motivated violence in the past, celebrated Cinco de Mayo in the "spirit of cultural appreciation," similar to St. Patrick's Day or Oktoberfest.[104] On Cinco de Mayo in 2009, there were fights on campus between white and Latino students, some of which centered on a makeshift American flag students hung from a tree on campus during the celebration.

In 2010, several students, including those appealing this case, wore American flag shirts to school on Cinco de Mayo. The students positioned themselves in the quad where the Cinco de Mayo celebrations were occurring. Several students, both white and Latino, approached the assistant principal to tell him to go to the quad because "there might be a problem," which the assistant principal understood meant there might be a fight.[105] At the principal's direction, the assistant

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[100] B.W.A. v. Farmington R-7 School District, 554 F.3d 734, 740 (8th Cir. 2009).
[101] Id. at 741.
[102] Ibid.
[103] 745 F.3d 354 (9th Cir. 2014).
[104] Id.at 357.
[105] Ibid.

principal met with the students wearing flag shirts and explained he was concerned for their safety. The students understood that their attire put them at risk of violence, one noting he was "willing to take on that responsibility" and two others stating they would have worn the flag shirts even if they knew violence would be directed toward them.[106]

After this discussion, school officials permitted two students to return to class, determining that their shirts had less prominent displays of the flag and would not have the same potential for targeting, but offered the remaining students the choice of turning their shirts inside out or going home for the rest of the day with excused absences and no disciplinary action; both students chose to go home.[107] Following this, the students received numerous threats from other students by text and phone, and another student on campus overheard students saying gang members would come to "take care of" the students who wore flag shirts.[108] As a result, the parents decided to keep the students at home on May 7. The parents of the three students filed a lawsuit against the district, the principal, and the assistant principal alleging violations of federal and state constitutional rights.

The Ninth Circuit analyzed the students' constitutional claims under the Tinker v. Des Moines Independent Community School District framework.[109] The students alleged violations of freedom of expression, due process, and equal protection clauses. The court first addressed the freedom of expression claims. Under Tinker, students may express even controversial opinions "if [they] do[] so without materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others."[110] Tinker further states that "conduct by the student, in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of free speech."[111] Citing to Karp v. Becken,[112] the Ninth Circuit explained that:

> "[T]he First Amendment does not require school officials to wait until disruption actually occurs before they may act. In fact, they have a duty to prevent the occurrence of disturbances" and "the level of disturbance required to justify official intervention is relatively lower in a public school than it might be on a street corner."

Finding that the school officials received warnings of violence "that came in the context of ongoing racial tension and gang violence within the school, and after a near-violent altercation had erupted" during the previous year's Cinco de Mayo celebration, the court determined that the school appropriately responded to the threats.[113] The court further opined that the restrictions on the students who filed this appeal were minimal and not a "trumped-up excuse to tamp down on student

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[106] Ibid.
[107] Id. at 358
[108] Ibid.
[109] 393 U.S. 503 (1969).
[110] Id. at 513.
[111] Id.
[112] 477 F.2d 171, 175 (9th Cir. 1973).
[113] Id. at 360.

expression."[114] Finding the school officials tailored their actions to avert violence and maintain student safety, the court noted that the students were not punished, a blanket ban was not enforced by the school, and the school responded appropriately in light of the history of similar disruptions just the previous year during the same activity.[115]

With regard to the equal protection claims, the Ninth Circuit followed a similar analysis to addressing the First Amendment claims, focusing on the Tinker standards. In applying Tinker, the court determined that a ban that might constitute viewpoint discrimination can be permissible where the ban is "necessary to avoid material and substantial interference with schoolwork or discipline."[116]

Finally, in response to the due process claims, the court found that the dress code provided sufficient detail to pass muster. Morgan Hill Unified School District's dress code prohibited clothing that "indicate[s] gang affiliation, create[s] a safety hazard, or disrupt[s] school activities."[117] Citing to Bethel School District, the Ninth Circuit noted that the United States Supreme Court recognizes that "given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code."[118] The court stated that if a dress code follows the Tinker standards, the dress code will not compromise First Amendment or due process rights. Other dress code language that courts have found permissible include prohibiting "'disrup[tive]' or 'offensive' clothing, including clothing that 'distract[s]' or 'interfere[s]';[119] or prohibiting clothing with "inappropriate symbolism."[120]

Although counsel for the students have already indicated they intend to seek en banc review and/or an appeal to the United States Supreme Court, the Ninth Circuit's opinion contains helpful language regarding dress code implementation. Practical steps districts can take in response to this decision include the following:

1. Review existing dress code policy to see if the language is permissible under the Morgan Hill standards and examples (examples from the case include: prohibiting clothing that indicates gang affiliation, creates a safety hazard, or disrupts school activities; prohibiting disruptive or offensive clothing, including clothing that distracts or interferes with the educational process; or prohibiting clothing with inappropriate symbolism).

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[114] Ibid.
[115] Ibid.
[116] 393 U.S. 503, 510-511. In support, the court also cited Harper v. Poway Unified Sch. Dist., 445 F.3d 1116 (9th Cir. 2006); Scott v. Sch. Bd. of Alachua Cnty., 324 F.3d 1246 (11th Cir. 2003); and West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358 (10th Cir. 2000).
[117] 745 F.3d 354, 362 (9th Cir. 2014).
[118] Bethel School District Number 403 v. Fraser, 478 U.S. 675, 686 (1986).
[119] 2014 WL 768797 at 7, citing Hardwick ex rel. Hardwick v. Heyward, 711 F.3d 426, 441, 444 (4th Cir.2013) *cert. denied*, --- U.S. ---, 134 S.Ct. 201, 187 L.Ed.2d 46 (2013).
[120] Id., citing A.M. ex rel. McAllum v. Cash, 585 F.3d 214, 224 (5th Cir. 2009).

2. Ensure that school officials appropriately document threats and information regarding possible threats of violence on campus, which may be used as the basis for dress code enforcement in situations like that at Live Oak High School.

3. Ensure that school officials individually assess the potential threat to students when dealing with potential disruptions resulting from student attire. In Morgan Hill, each student's attire was individually considered and each student was provided with options resulting from that individualized assessment.

Districts may wish to review related policies, procedures, and notification processes in light of this decision.

## J. Anti-Harassment Policy

In Saxe v. State College Area School District,[121] the Third Circuit Court of Appeals held that a school district's anti-harassment policy violated the First Amendment free speech rights of students. The Court of Appeals found that the policy prohibited a substantial amount of speech that would not have constituted actionable harassment under either federal or state law. The Court of Appeals determined that the policy was unconstitutionally overbroad because the policy prohibited a substantial amount of non-vulgar student speech and the policy's restrictions were not necessary to prevent substantial disruption or material interference with the work of the school or the rights of other students.[122]

In August 1999, the school district adopted an anti-harassment policy. The purpose of the policy was to provide all students with a safe, secure, and nurturing school environment. The policy indicated that disrespect among members of the school community is unacceptable behavior which threatens to disrupt the school environment and well being of the individual. The policy defines harassment as verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile, or offensive environment.[123]

The policy gives examples of the harassment which includes demeaning comments or behaviors, slurs, mimicking, name-calling, graffiti, innuendo, gestures, stalking, threatening or bullying. The policy defines various types of prohibited harassment including "other harassment" on the basis of characteristics such as "clothing, physical appearance, social skills, peer group, intellect, educational program, hobbies, or values."[124]

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[121] 240 F.3d 200, 140 Ed.Law Rep. 946 (3rd Cir. 2001). Judge Samuel Alito wrote the opinion of the court.
[122] Id. at 202.
[123] Id. at 202.
[124] Id. at 203.

The Court of Appeals noted that non-expressive, physically harassing conduct is entirely outside the scope of the Free Speech Clause. The court also noted that the Free Speech Clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs. When laws against harassment attempt to regulate oral or written expression on such topics, the Court of Appeals found that however detestable the views expressed may be, First Amendment rights are implicated.[125] The court noted that the bedrock principle underlying the First Amendment is that government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.[126]

The Court of Appeals pointed out that the school district policy prohibited harassment based on personal characteristics that are not protected under federal law (e.g. the policy includes personal characteristics such as clothing, appearance, hobbies, values and social skills). The court noted that insofar as the policy attempts to prevent students from making negative comments about other students' appearance, clothing, social skills, and, in particular, values, it unconstitutionally strikes at the heart of moral and political discourse which is the lifeblood of constitutional self-government and the core concern of the First Amendment.[127]

The Court of Appeals found that the policy went beyond protecting the rights of other students. The Court of Appeals noted that there was no evidence on the record of past disruptions but only objections by students of comments made by other students. The court distinguished the holding in West v. Derby Unified School District and held that in Saxe there was insufficient evidence of possible disruption or invasion of the rights of others. The Court of Appeals stated:

> "To summarize: Under Fraser, a school may categorically prohibit lewd, vulgar, or profane language. Under Hazelwood, a school may regulate school-sponsored speech . . . on the basis of any legitimate pedagogical concern. Speech falling outside of these categories is subject to Tinker's general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the rights of others."[128]

The Court of Appeals concluded that the policy appears to cover substantially more speech than could be prohibited under Tinker substantial disruption test and that therefore the policy is unconstitutionally overbroad.

## K. Threatening Statements

In Lovell v. Poway Unified School District,[129] the Court of Appeals held that a statement allegedly made by an angry high school student to a school guidance counselor, "if you don't give me this schedule change, I'm going to shoot you," was not entitled to First Amendment protection.

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[125] Id. at 206.
[126] Id. at 209; citing Texas v. Johnson, 491 U.S. 397, 414, 109 S.Ct. 2533 ( 1989).
[127] Id. at 210.
[128] Id. at 215; citing Chandler v. McMinnville School District, 978 F.2d 524 (9th Cir. 1992).
[129] 90 F.3d 367 (9th Cir. 1996).

The court held that a threat is a "true threat" if a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.[130] The court noted, "in light of the violence prevalent in schools today, school officials are justified in taking very seriously student threats against faculty or other students."[131] The court concluded that the student had the burden of proof to show that her First Amendment rights had been violated and that she had not met that burden even though she disputed the content of the statement that was made.[132]

The facts in LaVine v. Blaine School District[133] illustrate the difficulty of forecasting substantial disruption. In LaVine, the student wrote a poem entitled, "Last Words". The poem states in part:

> "As I approached, the classroom door, I drew my gun and, threw open the door, **Bang Bang Bang Bang**.
>
> "When it was all over, 28 were, dead, and all I remember, was not feeling, any remorse, for I felt, I was, cleansing my soul.
>
> "I quickly, turned and ran, as the bell rang, all I could hear, were screams, screams of friends, screams of coworkers, and just plain, screams of sheer horror, as the students, found their, slain classmates . . ."[134]

Around that time, several school shootings had occurred. The student showed the poem to his mother who warned him not to show it to teachers at school because of everything that had been on the news with respect to school violence. The student later brought the poem to school and showed it to several of his friends and then showed it to his teacher. The teacher then showed it to the school counselor who then showed it to the school's vice principal. School officials were also aware of issues of violence in the home as well as the student's suicidal thoughts and past incidents. The school then contacted child protective services, who then recommended contacting law enforcement. Law enforcement, in consultation with a mental health professional, determined there were insufficient grounds to determine the student was in imminent danger of causing serious harm to himself and others and declined to commit the student.

The principal of the school decided to expel the student as a danger or threat to other students. The student became upset and used profanity and ran out of the principal's office. The parents then hired an attorney and the parent's attorney and the school district's attorney agreed to have the student evaluated by a psychiatrist at the school district's expense to determine whether it was safe for the student to return to class. The student then met with the psychiatrist on three occasions and after the third meeting the psychiatrist recommended that the student return to school.

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[130] Id. at 372.
[131] Ibid.
[132] Id. at 373.
[133] 257 F.3d 981, 155 Ed.Law Rep. 1019 (9th Cir. 2001).
[134] Id. at 983.

Shortly thereafter the school district rescinded its expulsion and the student was allowed to return to return to school after missing 17 days. The student completed the school year without incident.

The student then sued the school district alleging that his First Amendment rights had been violated when the school district expelled him for 17 days. The Court of Appeals reviewed the case law under the First Amendment and found that the poem was neither vulgar, lewd, obscene or plainly offensive under Fraser, nor was the poem school-sponsored speech under Kuhlmeier.[135] The Court of Appeals held that the poem fell within the "all other speech" category in Chandler and that school officials must justify their decision by showing facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities. The Court of Appeals noted that Tinker and Chandler do not require school officials to wait until disruption actually occurs before they act and noted that school officials have a duty to prevent the occurrence of disturbances. The court noted that forecasting disruption is unmistakably difficult to do and Tinker does not require certainty that disruption will occur but rather the existence of facts which might reasonably have led school officials to forecast substantial disruption.[136]

The Court of Appeals concluded that given the potential for substantial disruption based on the content of the poem, the Court of Appeals could not fault the school district's response. The Court of Appeals concluded that the expulsion was justified and when the emergency subsided, the school district allowed the student to return to classes as soon as he was evaluated by a psychiatrist who determined, after three meetings, that the student was not a threat to himself or others. Considering all of the relevant facts and the totality of the circumstances, the Court of Appeals held that the school district's expulsion was reasonable and did not violate the First Amendment.[137] The Court of Appeals stated:

> "At the time the school officials made the determination to emergency expel James, there were facts which might reasonably have led them to forecast a substantial disruption or a material interference with school activities. . . . School officials have a difficult task in balancing safety concerns against chilling free expression. This case demonstrates how difficult that task can be."[138]

In Wisniewski v. Board of Education,[139] the Second Circuit Court of Appeals held that threats by an eighth grader over the Internet were not protected by the First Amendment.

The student used AOL instant messaging software on his parents' home computer to transmit a small drawing of a pistol firing a bullet at a person's head above which were dots representing splattered blood. Beneath the drawing appeared the words, "Kill Mr. VanderMolen." Philip VanderMolen was the student's English teacher at the time. The student sent the instant messages to

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[135] Id. at 989; citing Bethel School District v. Fraser, 478 U.S. 675, 106 S.Ct. 3159 (1986); Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562 (1988).
[136] Id. at 989; citing Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733 (1969); Chandler v. McMinnville School District, 978 F.2d 524 (9th Cir. 1992); Karp v. Becken, 477 F.2d 171 (9th Cir. 1973).
[137] Id. at 990.
[138] Id. at 992.
[139] 494 F.3d 34, 223 Ed.Law Rep. 34 (2d Cir. 2007).

15 members of his buddy list, but the instant messages were not sent to the teacher or any other school official. The messages were available for viewing for three weeks by the student's buddy list, some of whom were classmates. During that three week period another classmate brought the message to the attention of the teacher who forwarded it to the principal of the school.[140]

The principal contacted the student's parents and the student expressed regret for sending the message. The student was suspended for five days pending a hearing. The teacher asked, and was allowed to stop teaching the student's class.[141]

A hearing officer appointed by the New York school district found that the message was threatening and should not have been understood as a joke. The hearing officer concluded that although the threatening act took place outside of school, it was in violation of school rules and disrupted school operations by requiring special attention from school officials, replacement of the threatened teacher, and interviewing students during class time. The hearing officer then recommended a one semester suspension under New York law.[142]

The United States District Court upheld the hearing officer's decision and the United States Second Circuit Court of Appeals affirmed the U.S. District Court's decision. The Court of Appeals held that school officials have broad authority to sanction student speech that is reasonably understood as urging violent conduct. The Court of Appeals applied the standard in Tinker,[143] which indicates that the following types of conduct are not protected by the First Amendment:

1. Conduct that would substantially interfere with the work of the school.

2. Conduct that would cause material and substantial interference with school work or discipline.

3. Conduct that would materially and substantially disrupt the work and discipline of the school.

4. Conduct that might reasonably have led school authorities to forecast substantial disruption of, or material interference with, school activities.[144]

The Court of Appeals concluded:

> "Even if Aaron's transmission of an icon depicting and calling for the killing of his teacher could be viewed as an expression of opinion within the meaning of Tinker, we conclude that it crosses the boundary of protected speech and constitutes student conduct that poses a reasonably foreseeable risk that the icon would come to the

[140] Id. at 35.
[141] Id. at 36.
[142] Ibid.
[143] See, Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733 (1969).
[144] Id. at 38-39.

> attention of school authorities and that it would materially and substantially disrupt the work and discipline of the school. . . . For such conduct, Tinker affords no protection against school discipline."[145]

The Court of Appeals went on to state that the fact that the creation and transmission of the instant message occurred away from school property does not necessarily insulate the student from school discipline. If the off campus conduct can create a foreseeable risk of substantial disruption within a school, school districts may discipline the student. In Wisniewski, the Court of Appeals concluded that it was foreseeable that by communicating the message to so many friends and students, the message would reach the teacher and school officials.[146]

The decision of the Second Circuit Court of Appeals is not binding in California. However, the decision cites several Ninth Circuit cases which are binding in California and is part of a larger trend in which the courts are supporting school districts in disciplining students who make threats over the Internet.[147]

In Hardwick v. Heyward,[148] the Fourth Circuit Court of Appeals held that school officials did not violate a student's First Amendment rights to free speech by prohibiting the student from wearing clothing displaying a Confederate flag. The Court of Appeals found that there was a history of racial incidents in the school. There was a possibility of substantial disruption if the student was allowed to wear the shirts with the Confederate flag. The court noted that other courts have upheld school officials' decisions to prohibit the Confederate flag at school because past racially charged incidents allowed the officials to predict that the Confederate flag would disrupt the schools.[149] The Court of Appeals concluded:

> "Although students' expression of their views and opinions is an important part of the educational process and receive some First Amendment protection, the right of students to speak in school is limited by the need for school officials to ensure order, protect the rights of other students, and promote the school's educational mission. When, as here, student speech threatens to disrupt school, school officials may prohibit or punish that speech. The Latta school officials therefore did not violate Candice's First Amendment right when they refused to allow her to wear Confederate flag shirts and protest shirts at school, and the dress codes and their enforcement did

[145] Id. at 38-39; citing LaVine v. Blaine School District, 257 F.3d 981, 989-92 (9th Cir. 2001); Boucher v. School Board, 134 F.3d 821, 827-28 (7th Cir. 1998); J.S. v. Bethlehem Area School District, 757 A.2d 412, 422 (Pa. Cmwlth. 2000).
[146] 494 F.3d 34, 39 (2nd Cir. 2007).
[147] Lovell v. Poway Unified School District, 90 F.3d 367 (9th Cir. 1996); LaVine v. Blaine School District, 257 F.3d 981 (9th Cir. 2001).
[148] 711 F.3d 426, 290 Ed.Law Rep. 484 (4th Cir. 2013).
[149] See, Defoe v. Spiva, 625 F.3d 324 (6th Cir. 2010); A.M. v. Cash, 585 F.3d 214 (5th Cir. 2009); B.W.A. v. Farmington R-7 School District, 554 F.3d 734 (8th Cir. 2009); Scott v. School Board of Alachua County, 324 F.3d 1246 (11th Cir. 2003); West v. Derby Unified School District No. 260, 206 F.3d 1358 (10th Cir. 2000).

not infringe on Candice's Fourteenth Amendment rights. Thus, the judgment of the District Court is affirmed."[150]

## L. Lawsuit Against Students Posting Derogatory Statements

In D.C. v. R.R.,[151] the California Court of Appeal affirmed the lower court's refusal to dismiss a lawsuit brought by a high school student and his parents for defamation and intentional infliction of emotion distress against other students and their parents for posting derogatory comments on the student's website and threatening him with bodily harm. The Court of Appeal held that the threatening messages posted on the student's website were not protected by the First Amendment.

D.C., the student plaintiff, attended Harvard-Westlake School, a private educational institution in Los Angeles. While a high school student at Harvard-Westlake, D.C. pursued a career as a singer and an actor. He had a record album with a planned release date, had broadcast a song worldwide via satellite radio, and had played the leading role in a feature film.[152]

D.C. maintained a website to promote his entertainment career. The website allowed any member of the public to post comments in a guestbook. Several students at Harvard-Westlake went to the website and posted threats against D.C. and made derogatory comments about him.[153]

One post read, "F___, I'm going to kill you." Another read, "You need a quick and painless death." A third post stated, "You are now officially wanted dead or alive."[154]

The Court of Appeal summarized the postings as threats that sought to murder D.C. and drive him out of Harvard-Westlake and the community in which he lived. When D.C.'s father read the threats at the website, he immediately informed Harvard-Westlake of the problem and contacted the Los Angeles Police Department (LAPD).[155]

On the advice of the police, D.C. withdrew from Harvard-Westlake. He and his family moved to Northern California where he went to a different educational institution. The Harvard-Westlake student newspaper ran at least two articles on the matter. One of the articles disclosed D.C.'s new residential location and the name of the school he was attending. The article also disclosed that posts at the website referred to D.C. using a derogatory term for homosexuals. Harvard-Westlake did not suspend or expel any of the students who admitted posting the threats.[156]

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[150] Id. at 444.
[151] 182 Cal.App.4th 1190, 106 Cal.Rptr.3d 399, 254 Ed.Law Rep. 305 (2010).
[152] Id. at 1200.
[153] Ibid.
[154] Ibid. Other posts contained a number of four-letter words and derogatory terms related to homosexuals which we have not repeated here.
[155] Id. at 1200-01.
[156] Id. at 1201. It appears from the facts described in the court decision that if the students who posted the threatening statements on D.C.'s website attended a public school, the students could possibly have been suspended and/or expelled for cyberbullying under Education Code section 48900(r).

D.C. filed a lawsuit alleging that the defendants had violated his rights under the state's hate crimes laws to be free from threat of violence motivated by perceived sexual orientation. The lawsuit alleged defamation, claiming that the defendants had libeled D.C. by calling him a homosexual. The complaint also alleged intentional infliction of emotional distress, contending that the defendants' conduct was outrageous and it caused plaintiffs to suffer severe emotional distress.[157]

D.C. named as defendants six students and their parents. Among those sued was R.R., a student and his parents. R.R. and his parents filed a motion to dismiss the complaint alleging that the postings that R.R. posted were protected speech under the First Amendment. The trial court and the Court of Appeal denied the motion to dismiss and held that the statements that were posted were not protected speech under the First Amendment.[158]

R.R. posted the following message on D.C.'s website:

> "Hey [D.C.], I want to rip out your f____ heart and feed it to you. I heard your song while driving my kid to school and from that moment on I've…wanted to kill you. If I ever see you I'm…going to pound your head in with an ice pick. F___ you, you [derogatory term for homosexuals]. I hope you burn in hell."[159]

In opposition to the motion to dismiss, D.C.'s father filed a declaration with the court stating that there were 34 outrageously offensive postings made on D.C.'s website, 23 of which falsely identify D.C. as a homosexual. The LAPD advised D.C.'s father to have D.C. stay home from school until a thorough investigation had been completed. Other than one examination, D.C. did not return to school due to fear for his life.[160]

D.C.'s father stated that D.C. would have returned to Harvard-Westlake if the school had done an investigation and the school would ensure D.C.'s safety, but no such assurances came from Harvard-Westlake. Of the 34 offensive postings, D.C.'s father stated that six were perceived as death threats to D.C. and his family. The message posted by R.R. in particular was considered by D.C.'s father to be the most evil and malicious of the postings and D.C.'s father stated that R.R.'s message terrified D.C.'s family and made D.C. physically nauseous from the threat.[161]

D.C.'s father stated that D.C. started to suffer from frequent and severe panic attacks which required medical attention and from which he still suffers. D.C. was approached by others who had seen the postings and asked him about being a homosexual and whether he was concerned for his safety which added to D.C.'s embarrassment and distress. D.C.'s father stated that the family suffered emotional distress, anxiety, sleeplessness, physical pain, insecurity, fear, pain and suffering, payment of attorneys' fees, payment of medical expenses, payment of moving expenses, payment of travel and housing expenses, and lost income. D.C.'s father stated that D.C. suffered from poor

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[157] Ibid.
[158] Ibid. See, Code of Civil Procedure section 425.16.
[159] Id. at 1201-02. We have deleted some of the more derogatory terms.
[160] Id. at 1201.
[161] Id. at 1202-04.

academic performance during his junior year which compelled the family to hire a tutor and educational therapist.[162]

In his declaration, R.R. stated that he did not know D.C. and was not motivated by anti-homosexual views to post the message on D.C.'s website. R.R. stated that he received an instant message from a fellow student with the Internet link for D.C.'s website and viewed the website as offensive. R.R. believed that D.C.'s website was blatant bragging and self-promotion and was narcissistic in tone.[163]

R.R. stated that he saw many derogatory messages posted on D.C.'s website and that he sought to outdo the other messages. R.R. stated that he thought the other postings were funny and that he was in a playful mood when he posted the message. R.R. stated that he had no intention to do physical harm to D.C. and that his message was "fanciful, hyperbolic, jocular and taunting and was motivated by D.C.'s pompous, self-aggrandizing and narcissistic website – not his sexual orientation. My only other motivation, a bit more pathological, was to win the one-upmanship contest that was tacitly taking place between the message posters."[164]

R.R. stated in his declaration to the court that the next day he heard students at school talking about the posts and that the students indicated that they thought the posts were funny and that none of the students took the posts seriously as a death threat or an accusation of homosexuality. R.R. also stated that he did not participate in these conversations because he was ashamed of his participation and that in retrospect he felt that his conduct was infantile, immature, and beneath him. R.R. stated, "I felt ashamed that I would allow the desire for peer approval, peer pressure, to induce me into acting like an idiot."[165]

R.R. stated in his declaration that he wrote a letter of apology to D.C. and his family. R.R. stated that he told D.C. and his family that he never intended to harm D.C. or his family and that if there was anything he could do to atone for his actions to let him know. R.R. stated that he never received a response to his letter.[166]

R.R.'s father stated in his declaration that he was not aware of the posting that his son made on D.C.'s website at the time it was made. R.R.'s father stated that when he discovered R.R.'s conduct, he terminated R.R.'s access to the Internet, instituted various punishments, including grounding, no cell phone use and no car use, had him evaluated by a psychiatrist in a further effort to ensure that such conduct was never repeated. R.R.'s father stated that R.R. cooperated with the police investigation and that R.R. was not charged with a crime by the police or the district attorney.[167]

In his motion to dismiss, R.R. argues that his posted message was "jocular humor" entitled to First Amendment protection. The Court of Appeal disagreed and stated that R.R.'s evidence as to

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[162] Ibid.
[163] Id. at 1204-07.
[164] Id. at 1204-06.
[165] Ibid.
[166] Ibid.
[167] Id. at 1207-09.

whether the message was protected speech was self-contradictory. In addition, the Court of Appeal held that R.R.'s message was not a statement made in connection with a "public issue" and therefore was not constitutionally protected under the state statute.[168]

Under the state statute, a defendant may file a motion to strike if they are served with a lawsuit arising from any act of the defendant in furtherance of the person's right of free speech under the U.S. or California Constitution in connection with a public issue, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.[169] The California Legislature enacted the statute to protect defendants from interference with the valid exercise of their constitutional rights, particularly the right of freedom of speech and the right to petition the government for the redress of grievances.[170]

While the First Amendment prohibits Congress and states from making any law that abridges the freedom of speech, states may punish words that are "true threats." True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence from the disruption that fear engenders in addition to protecting people from the possibility that the threatened violence will occur.[171]

Where speech strays from the values of persuasion, dialogue and free exchange of ideas that the First Amendment was designed to protect, and moves toward threats made with specific intent to perform illegal acts, the state has greater latitude to enact statutes that effectively penalize such verbal expression.[172] As expansive as the First Amendment's conception of social and political discourse may be, threats made with specific intent to injure and focused on a particular individual, fall into a category of speech that deserves no First Amendment protection.[173]

Under an objective standard, the court's inquiry focuses on whether a reasonable person would foresee that the speaker's or author's statement would be interpreted by the recipient as a serious expression of intent to inflict bodily harm.[174] Under the subjective standard, a true threat requires proof that the speaker or author intended the speech as a threat of bodily harm.[175] In D.C., the Court of Appeal held under both standards, the posting was a true threat.

In addition, the Court of Appeal held that the state statute requires that the statement made by the defendant be in connection with a public issue. A public issue includes:

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[168] Id. at 1210. See, Code of Civil Procedure section 425.16.
[169] Id. at 1210-11. See, Code of Civil Procedure section 425.16(b)(1).
[170] Ibid. Contemporary Services Corp. v. Staff Pro Inc., 152 Cal.App.4th 1043, 1052, 61 Cal.Rptr.3d 434 (2007).
[171] Id. at 1212. See, also, Virginia v. Black, 538 U.S. 343, 358-360, 123 S.Ct. 1536, 1547-48 (2003).
[172] Ibid. Shackelford v. Shirley, 948 F.2d 935, 938 (5th Cir. 1991).
[173] Ibid.
[174] Id. at 1214. See, also, Fogel v. Collins, 531 F.3d 824, 831 (9th Cir. 2008).
[175] Ibid. See, U.S. v. Patillo, 431 F.2d 293, 298 (4th Cir. 1970).

1. Any written or oral statement or writing made before a legislative executive or judicial proceeding or any other official proceeding authorized by law.

2. Any written or oral statement or writing made in connection with an issue under consideration or review by a legislative executive or judicial body or any other official proceeding authorized by law.

**3. Any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.**

4. Any other conduct in furtherance of the exercise of the constitutional right of petitioner of a constitutional right of free speech in connection with a public issue or an issue of public interest.[176]

R.R. claims that plaintiff's complaint falls within the third category – any writing or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest. The Court of Appeal held that the posting on D.C.'s website was not an issue in the public eye that would affect large numbers of people or involved a topic of widespread public interest. The Court of Appeal also held that D.C.'s website was not a public forum in connection with an issue of public interest, and therefore, R.R. did not satisfy his burden of proof in filing its motion to dismiss. Accordingly, the Court of Appeal denied the motion to dismiss.[177]

The Court of Appeal went on to state that the First Amendment does not protect true threats and noted that cyberbullying is a serious problem in the United States. The Court of Appeal noted that youth who are cyberbullied often commit suicide and that cyberbullying has increased in recent years.[178]

The Court of Appeal then analyzed R.R.'s posting on D.C.'s web page and found the message to be unequivocal. The Court of Appeal held that it was a serious expression of intent to inflict bodily harm and that a reasonable person would foresee that R.R.'s message would be viewed as a threat of bodily harm. The Court of Appeal noted that D.C.'s father reacted by contacting the police and thought it prudent that D.C. not return to Harvard-Westlake until the police investigation was completed.[179]

In addition, the Court of Appeal found that there was nothing in R.R.'s post that would support a finding of jocular intent. The Court of Appeal noted that the tone was serious, not humorous. The Court of Appeal further noted that R.R.'s parents responded to the message by disciplining R.R., terminating his access to the Internet, and had R.R. evaluated by a psychiatrist to ensure his conduct was never repeated. The Court of Appeal stated that the evidence suggests that

[176] Ibid. Code of Civil Procedure section 425.16(e).
[177] Id. at 1214-15.
[178] Id. at 1218.
[179] Id. at 1218-20.

R.R.'s parents thought the "root cause" of his behavior was something other than his sense of humor. Therefore, under both the objective and subjective standard, the Court of Appeal found that R.R.'s message was a true threat and not protected by the First Amendment.[180]

The Court of Appeal denied R.R.'s motion to dismiss D.C.'s complaint, thus allowing the matter to go to trial. The Court of Appeal decision in D.C. reaffirms prior court cases that have stated that threats are not protected by the First Amendment and that parents and students may be held civilly liable for threatening statements posted on the Internet, sent by e-mail, or transmitted by other means.[181]

## M. Threat to Shoot Other Students

In D.J.M. v. Hannibal Public School District No. 60,[182] the Eighth Circuit Court of Appeals held that the school district had not violated the First Amendment rights of a student when it suspended the student based on threats the student made to shoot other students.

In the fall of 2006, D.J.M. was beginning his tenth grade year at the high school. He frequently communicated with his friends online by instant messaging. After school on October 24, 2006, D.J.M. sent instant messages from his home computer to several of his friends, including C.M., who was also using her home computer. C.M. became concerned about D.J.M.'s text messages and e-mailed portions of those messages to an adult friend and later to the principal of the high school.[183]

The transcript of the retained portion of the instant message conversation begins with D.J.M. discussing his frustration at having recently been spurned by a female student. D.J.M. then discusses online the kind of gun he would use to shoot fellow students (a .357 Magnum), and then names specific students who he would have to get rid of. D.J.M. talked about taking a gun to school, shooting everyone he hates, and then shooting himself. C.M. was scared by these messages and forwarded them to an adult friend who advised her to forward them to the principal of the school. D.J.M. later commented that if he had a gun, a particular-named classmate would be the first to die. D.J.M. also stated that he wanted Hannibal to be known for something and that after he shot the people he didn't like, he would shoot himself.[184]

The principal then contacted the police, who went to D.J.M.'s house that same evening and interviewed him. D.J.M. was taken into custody, placed in juvenile detention, and then referred by the juvenile court to a hospital for psychiatric examination. He was evaluated at the psychiatric hospital where he admitted that he had contemplated suicide. When he was discharged from the hospital on November 28, 2006, he was returned to juvenile detention.[185]

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[180] Id. at 1220-22.
[181] Id. at 1230-31.
[182] 647 F.3d 754, 270 Ed. Law Rep. 465 (8th Cir. 2011).
[183] Id. at 757.
[184] Id. at 758.
[185] Id. at 759.

On October 31, 2006, the high school decided to suspend D.J.M. for ten days. On November 3, 2006, the district superintendent extended the suspension for the rest of the school year because D.J.M. had been placed in juvenile detention and his instant message conversation had had a disruptive impact on the school. D.J.M.'s comments had spread around the school community and the principal received numerous phone calls from concerned parents asking what the school was doing to address D.J.M.'s threats.[186]

D.J.M. was given a hearing on the suspension (i.e., expulsion) and the school board unanimously affirmed the student suspension for the remainder of the 2006-2007 school year. D.J.M.'s parents subsequently filed a lawsuit in state court. The school district removed the matter to federal court. The U.S. District Court granted the school district's motion for summary judgment and the parents appealed.[187]

The Court of Appeals noted that the Supreme Court had not decided the First Amendment question in a school discipline case where there was a student threat of violence.[188] The Court of Appeals noted that there are two lines of cases in this area, one line of cases evaluating "true threats," and the other evaluating cases on the basis of disruption of the educational process. The Court of Appeals noted that in Doe v. Pulaski County Special School District,[189] the Eighth Circuit Court of Appeals upheld the school district in a case in which a student wrote threatening letters. The student gave the letters to a third party. The letters threatened to kill another student. In Doe, the Court of Appeals defined a true threat as a "statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another."[190] The speaker must, in addition, have intended to communicate his statement to another and that element of a true threat is satisfied if the speaker communicates the statement to the object of the purported threat or to a third party.[191]

In D.J.M., the Court of Appeals concluded that D.J.M. had the requisite intent to communicate his threat because he communicated his statements to C.M., and that he should have reasonably foreseen that his statements would have been communicated to his alleged victims since a reasonable person should be aware that electronic communications can be easily forwarded.[192] The Court of Appeals noted that D.J.M. identified a specific kind of gun he could use and listed a number of specific individuals he planned to shoot. Combined with his admitted depression, his expressed access to weapons, and his statement that he wanted Hannibal to be known for something, the Court of Appeals found no genuine dispute of material fact regarding whether D.J.M.'s speech could reasonably be understood as a true threat.[193]

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[186] Id. at 759-60.
[187] Ibid.
[188] See, Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733 (1969); Bethel School District No. 403 v. Fraser, 478 U.S. 675, 106 S.Ct. 3159 (1986); Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562 (1988); Morse v. Frederick, 551 U.S. 393, 127 S.Ct. 2618 (2007).
[189] 306 F.3d 616 (8th Cir. 2002).
[190] Id. at 624.
[191] Id. at 624.
[192] See, also, Riehm v. Engelking, 538 F.3 952, 962 (8th Cir. 2008).
[193] 647 F.3d 754, 764 (8th Cir. 2011).

The Court of Appeals held that the First Amendment did not require the district to wait and see whether D.J.M.'s talk about taking a gun to school and shooting certain students would be carried out. The school district had reason to be alarmed upon hearing about the threats and it appropriately intervened and appropriately referred the matter to the police. The Court of Appeals also found that the district afforded D.J.M. a full due process hearing to challenge his suspension.[194]

In addition, the Court of Appeals found that the line of school cases that used a substantial disruption analysis also supported the school district's actions.[195] Based on Tinker, the Court of Appeals held that conduct by a student which might reasonably have led school authorities to forecast substantial disruption of a material interference with school activities is not protected by the First Amendment.[196]

The Court of Appeals noted that in D.J.M.'s case, D.J.M.'s instant messages had caused substantial disruption in the school. Parents and students had notified school authorities expressing concerns about student safety and asking what measures the school was taking to protect them. Parents and students also asked about a rumored "hit list" and who had been targeted. School officials had to spend considerable time dealing with these concerns and ensuring that appropriate safety measures were in place. The district court and the Court of Appeals concluded that the school had been substantially disrupted because of D.J.M.'s threats and held that the school district had not violated D.J.M.'s First Amendment rights. The Court of Appeals concluded:

> "One of the primary missions of schools is to encourage student creativity and to develop student ability to express ideas, but neither can flourish if violence threatens the school environment."[197]

In Wynar v. Douglas County School District,[198] the Ninth Circuit Court of Appeals held that the school district did not violate a student's First Amendment free speech rights when it suspended him and expelled him for 90 days for making threats to shoot students at his high school. The Court of Appeals, citing the U.S. Supreme Court's decision in Tinker v. Des Moines Independent Community School District,[199] held that school officials may prohibit speech that might reasonably lead school authorities to forecast substantial disruption of or material interference with school activities or that collides with the rights of other students to be secure and to be let alone.[200]

In Wynar, a student engaged in a string of increasingly violent and threatening instant messages sent from home to his friends bragging about his weapons, threatening to shoot specific classmates, intimating that he would shoot specific people on a specific date, and invoking the

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[194] Id. at 764-65.
[195] See, Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733 (1969); Wisniewski v. Weedsport Central School District, 494 F.3d 34, 36 (2nd Cir. 2007).
[196] Id. at 514. See, also, Boim v. Fulton County School District, 494 F.3d 978 (11th Cir. 2007).
[197] 647 F.3d 754, 766 (8th Cir. 2011).
[198] 728 F.3d 1062, 297 Ed.Law Rep. 32 (9th Cir. 2013).
[199] 393 U.S. 503, 506, 89 S.Ct. 733 (1969).
[200] Id. at 508, 514.

images of the Virginia Tech massacre. The student's friends were alarmed and notified school authorities.[201]

The messages centered around a school shooting to take place on April 20 (the date of Hitler's birth and the Columbine massacre, and within days of the anniversary of the Virginia Tech massacre) and indicated that the student had access to guns and ammunition and wanted to kill specific students. The student's friends told the football coach, who then informed the school principal. Two police officers interviewed the two friends, reviewed the messages, and questioned the student in the principal's office.[202]

The Court of Appeals concluded that the Douglas County School District did not violate the student's First Amendment rights. The court stated, "Landon's messages, which threatened the safety of the school and its students, both interfered with the rights of other students and made it reasonable for school officials to forecast a substantial disruption of school activities."[203]

The Court of Appeals held that given the subject of the student's messages, there was a direct nexus to the school and that it was reasonably foreseeable that his messages would reach the school campus. Confronted with messages that could be interpreted as a plan to attack the school, written by a student with confirmed access to weapons, and brought to the school's attention by fellow students, the court concluded that school officials faced a dilemma that every school dreads. The court noted that school officials have a difficult task in balancing safety concerns against showing free expression. However, under the circumstances of this case, the court held that the school district did not violate the student's First Amendment rights.[204]

The Court of Appeals held that even though the student claimed that he was joking, it was reasonable for the school district to interpret the messages as a real risk and to forecast a substantial disruption. The court noted that the harm described would have been catastrophic had it occurred. The court concluded:

> "Landon's messages threatened the student body as a whole, and targeted specific students by name. They represent the quintessential harm to the rights of other students to be secure."[205]

The Court of Appeals also held that the student's due process rights were not violated. The court held that the student had the right to be represented by an advocate of his choosing, including counsel, to present evidence, and to call and cross-examine witnesses. The court held that the student was not entitled to be provided with evidence in advance of the hearing as these rights were not constitutionally required. The court also noted that the student had the key evidence, the written messages.[206]

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[201] 728 F.3d 1062, 1064-65 (9th Cir. 2013).
[202] Id. at 1065.
[203] Id. at 1067.
[204] Id. at 1069.
[205] Id. at 1072.
[206] Id. at 1074.

In summary, the Court of Appeals upheld the right of school districts to expel and suspend students who make serious threats against other students and staff, even if the threats to the school are made from off campus. This decision should be beneficial to school districts.

## N. Threatening Drawings

In Cuff v. Valley Central School District,[207] the Second Circuit Court of Appeals held that school officials reasonably could have concluded that a student's drawings would substantially disrupt the school environment.

In January 2006, B.C. drew a picture depicting a person firing a gun, and above it, B.C. had written: "One day I shot 4 people. Each of them got fo[ur] blows + they were dead. I wasted 20 bulits [sic] on them."[208] B.C.'s teacher alerted the school psychologist and school officials contacted B.C.'s parents. B.C. said that he was portraying a game of paint ball in the drawing.[209]

In the Spring of 2007 as part of a Fourth Grade in class assignment, B.C. wrote a story about a big wind that destroyed every school in America and everybody ran for their life and all adults died and all the kids were alive. Prior to September 2007, B.C. had also been disciplined by teachers and school administrators for misbehavior including numerous altercations during recess, pushing and shoving in the hallways and rough play at school.[210]

On September 12, 2007, B.C.'s science teacher asked for students to fill in a picture of an astronaut and write various things about the astronaut. The students were instructed to write a "wish" in the left leg of the astronaut. B.C. wrote, "Blow up the school with the teachers in it."[211]

B.C. told other students what he was going to write and the other students laughed, except for one student who appeared very worried and told the teacher about the drawing. The teacher approached B.C. and asked him if he meant what he had written. B.C. looked at the teacher with a blank and serious face. The teacher then sent B.C. to the principal's office.[212]

The principal and the assistant principal asked if he meant what he had written in the drawing. B.C. testified that he told them that he did not mean what he had written. The principal then called the superintendent for advice regarding B.C.'s punishment. The principal summarized B.C.'s history of misbehavior at school and the superintendent advised the principal that suspension of B.C. would be appropriate.[213]

The principal met with B.C. and his parents and suspended B.C. for five days. The student appealed the suspension to the Board of Education. The Board of Education upheld the suspension. The parents then filed an action in federal court alleging B.C.'s First Amendment right to freedom of

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[207] 677 F.3d 109 (2nd Cir. 2012).
[208] Id. at 111.
[209] Ibid.
[210] Ibid.
[211] Ibid.
[212] Ibid.
[213] Ibid.

expression had been violated by imposing an excessive punishment in disciplining B.C. as a result of the astronaut drawing. The district court dismissed the action and the parents appealed. On appeal, the Second Circuit Court of Appeals vacated the dismissal and remanded the matter back to the district court. On remand, the parties completed discovery and the school district moved for summary judgment. The district court moved for summary judgment. The district court then granted the motion for summary judgment. The Court of Appeals affirmed.[214]

The Court of Appeals noted that while public school students are protected by the First Amendment, their First Amendment rights are not automatically coextensive with the rights of adults in other settings and must be applied in light of the special characteristics of the school environment.[215] The Court of Appeals noted that student speech may be curtailed if the speech will materially and substantially interfere with the requirements of appropriate discipline and the operation of the school. School authorities may suppress student speech to prevent material disruption of the schools, when they have more than an undifferentiated fear or apprehension of disturbance and can show that their action was caused by something more than a mere desire to avoid the discomfort and the unpleasantness that always accompanies an unpopular viewpoint.[216] In applying this criteria the second circuit has held that the relevant inquiry is whether the record demonstrates facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.[217] The Court of Appeals held that this test does not require school administrators to prove that actual disruption occurred or that substantial disruption was inevitable. Rather, the question is whether school officials might reasonably portend disruption from the student expression at issue.[218]

The Court of Appeals held that the test is an objective one, focusing on the reasonableness of the school administration's response, not on the intent of the student.[219] The court held that it is not for the courts to determine how school officials should respond and that school administrators are in the best position to assess the potential for harm and act accordingly. It is the function of public school education to prohibit the use of vulgar and offensive terms in public discourse and the determination of what manner of speech in the classroom is inappropriate properly rests with the school board.[220]

Applying these standards, the Court of Appeals upheld B.C.'s suspension. The court held that it was reasonably foreseeable that the astronaut drawing could create a substantial disruption at the school. When B.C. was suspended, he had a history of disciplinary issues, and his other earlier drawings and writings had also embraced violence. Prior to the astronaut drawing, school

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[214] Id. at 112.
[215] Id. at 113; citing, Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 266, 108 S.Ct. 562 (1988).
[216] Ibid.
[217] Ibid.; citing, DeFabio v. E.Hampton Union Free School District, 623 F.3d 71, 78 (2nd Cir. 2010).
[218] Ibid.; citing, Doninger v. Niehoff, 527 F.3d 41, 51 (2nd Cir. 2008).
[219] Ibid.; citing, Wisniewski v. Board of Education of Weedsport Central School District, 494 F.3d 34, 40 (2nd Cir. 2007); Ponce v. Socorro Independent School District, 508 F.3d 765, 767, 772 (5th Cir. 2007) (holding that a high school student's violent story depicting a school shooting was not constitutionally protected, despite the student's claim that he meant it as a work of fiction and not a threat); Boim v. Fulton County School District, 494 F.3d 978, 981, 984-85 (11th Cir. 2011) (also holding that a high school student's violent story was not constitutionally protected, despite the student's claim that it was meant as a work of fiction).
[220] Ibid.; citing Bethel School District No. 403 v. Fraser, 478 U.S. 675, 628, 106 S.Ct. 3159 (1986).

administrators discussed B.C.'s other drawings and writings with the principal expressing their concern. The school psychologist testified that she had spoken with the principal about B.C.'s disciplinary issues and prior drawings. In addition, the astronaut drawing was seen by other students in the class and caused one student to be concerned and bring it to the teacher's attention. The teacher perceived the student to be very worried about the drawing. Whether B.C. intended his wish as a joke or never intended to carry out the threat is irrelevant the Court held. Nor does it matter that B.C. lacked the capacity to carry out the threat expressed in the drawing. Courts have allowed lively weight to school administrators disciplining students for writings or other conduct threatening violence, because school administrators must be permitted to react quickly and decisively to address physical violence without worrying that they will have to face years of litigation, second guessing their judgment as to whether the threat posed a real risk of substantial disturbance.[221]

The threat of substantial disruption was aggravated by B.C.'s sharing of his wish with fellow students, an act reasonably perceived as an attention grabbing device. School administrators might reasonably fear that if permitted, other students might well be tempted to copy or escalate B.C.'s conduct. This might have then led to a substantial decrease in discipline, and increase in behavior distracting students and teachers from the educational mission and create a tendency to violent acts. Such a chain of events would be difficult to control because the failure to discipline B.C. would give other students engaging in such behavior an argument to add to the First Amendment contentions.[222]

The Court of Appeals held that school administrators also have to be concerned about the confidence of parents in a school system's ability to shield their children from frightening behavior and to provide for the safety of their children while in school. B.C.'s astronaut drawing being known by many students could easily have become known to a number of parents who could reasonably view it as something other than a contribution to the market place of ideas. While parents do not have the right to monitor student speech, they could be reasonably concerned for the safety of their children as a result of B.C.'s astronaut drawing. A failure of school administrators to respond forcefully to B.C.'s drawing might have led to a decline of parental confidence in school safety with many negative effects, including the need to hire security personnel and even a decline in enrollment. Therefore, the Court of Appeals concluded that school administrators could reasonably have concluded that B.C.'s astronaut drawing would substantially disrupt the school environment and their resulting decision to suspend B.C. was constitutional.[223]

## O. Criminal Threats

The California Supreme Court in In re: George T.[224] interpreted Penal Code section 422 and held that a poem written by a high school student did not rise to the level of a criminal threat that could be prosecuted as a crime. The decision in George T. did not review provisions of the Education Code relating to threats, nor did it rule on the appropriate standard for determining whether a statement is a threat in the context of school discipline.

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[221] Id. at 113-14.
[222] Id. at 114-15.
[223] Ibid.
[224] 33 Cal.4th 620, 16 Cal.Rptr.3d 61, 190 Ed.Law Rep. 550 (2004).

A higher standard applies when the District Attorney's office seeks to prosecute and imprison an individual whether an adult or a juvenile for making a statement that could be considered a threat. In George T., the California Supreme Court set a high standard for criminal proceedings but did not change the standard for determining whether a statement is a threat in the school context for purposes of school discipline.

In George T., a 15 year old minor wrote a poem which stated in part:

> "I am Dark, Destructive and Dangerous. I slap on my face of happiness, but inside I am evil!! For I can be the next kid to bring guns to kill students at school. So parents watch your students cuz I'm BACK!!"[225]

The California Supreme Court concluded that due to the ambiguous nature of the poem, along with the circumstances surrounding its dissemination, there was insufficient evidence to establish that the poem constituted a criminal threat.[226]

The California Supreme Court noted that in a prior decision, People v. Toledo,[227] the California Supreme Court made it clear that not all threats are criminal and set forth the elements necessary to prove the offense of making criminal threats under Penal Code section 422. The prosecution must prove the following:

1. That the defendant willfully threatened to commit a crime which will result in death or great bodily injury to another person.

2. That the defendant made the threat with the specific intent that the statement is to be taken as a threat, even if there is no intent of actually carrying it out.

3. That the threat, which may be made verbally, in writing, or by means of an electronic communication device, was on its face and under the circumstances in which it was made, so unequivocal, unconditional, immediate and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat.

4. That the threat actually caused the person threatened to be in sustained fear for his or her own safety or for his or her immediate family's safety.

5. That the threatened person's fear was reasonable under the circumstances.[228]

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[225] Id. at 625.
[226] Id. at 630.
[227] 26 Cal.4th 221 (2001).
[228] 33 Cal.4th 620, 637-38.

The California Supreme Court reviewed the poem itself, the conduct of the minor, and ruled that the threat was not so unequivocal, unconditional, immediate, and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution of a threat. The Court ruled that the poem conveyed the minor's feelings about the students around him, but was ambiguous as to whether the minor was threatening to bring a gun to school to kill students. The Court interpreted the poem as saying that the minor could be the next student to bring a gun to school but not that he would do so. In addition, the Court found that the circumstances surrounding the poem did not indicate a threat since there was no history of animosity or conflict between the students, no threatening gestures or mannerisms accompanied the poem, and no conduct suggested to the students who received the poem that there was an immediate prospect of execution of a threat to kill.[229]

While the Court did not find the poem to be a criminal threat, the Court stated:

> "Certainly, school personnel were amply justified in taking action following [a student's] e-mail and telephone conversation with her English teacher, but that is not the issue before us. We decide here only that minor's poem did not constitute a criminal threat."[230]

In a concurring opinion, Justice Baxter stated:

> "Under these circumstances, as the majority observed, school and law enforcement officials had every reason to worry that defendant, deeply troubled, was contemplating his own campus killing spree. . . . Accordingly, the authorities were fully justified, and should be commended, insofar as they made a prompt, full, and vigorous response to the incident. They would have been remiss had they not done so. Nothing in our very narrow holding today should be construed as suggesting otherwise."[231]

Thus, it is clear that the California Supreme Court in George T. did not intend to make a ruling with respect to threats and school disciplinary proceedings.

Education Code section 48900.7 states that in addition to other provisions in the Education Code, a student may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the student is enrolled determines that the student has made "terroristic threats" against school officials or school property or both. Section 48900.7(b) defines a "terroristic threat" as follows:

> "(b) For the purposes of this section, 'terroristic threat' shall include any statement, whether written or oral, by a person who willfully threatens to commit a crime which will result in death, great bodily injury to another person, or property damage in excess of one

[229] Id. at 638-39.
[230] Id. at 639.
[231] Id. at 640-41.

> thousand dollars ($1,000), with the specific intent that the statement is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, or for the protection of school district property, or the personal property of the person threatened or his or her immediate family."

The definition of terroristic threat in Section 48900.7(b) is virtually identical to the definition in Penal Code section 422, which defines terroristic threats for criminal purposes.

In addition to the above cited provisions in the Education Code, setting forth the grounds for suspension and expulsion, school districts must also take into consideration the provisions of Education Code section 48950, which guarantee free speech rights to high school students. Section 48950(a) states:

> "(a) School districts operating one or more high schools and private secondary schools shall not make or enforce any rule subjecting any high school pupil to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside of the campus, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution."

Section 48950(d) states that nothing in Section 48950 prohibits the imposition of discipline for harassment, threats, or intimidation, unless constitutionally protected. Determining whether a particular statement by a student is protected free speech under Section 48950 and the Constitution or is subject to discipline can be difficult.

The Court of Appeal in In Re Ricky T.[232] interpreted the provisions of Penal Code section 422 (which are virtually identical to Section 48900.7) and held that in order to sustain a finding that a student made a terroristic threat in violation of Penal Code section 422, the District Attorney must show:

1. The student willfully threatened to commit a crime that would result in death or great bodily injury.

2. The student made the threat with the specific intent that it be taken as a threat.

[232] 87 Cal.App.4th 1132, 105 Cal.Rptr.2d 165 (2001).

3. The threat, on its face and under the circumstances in which it was made, was so unequivocal, unconditional, immediate, and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution of the threat.

4. The threat caused the person threatened reasonably to be in sustained fear for his own safety.[233]

In Ricky T., the Court of Appeal found that there was insufficient evidence to show that a student had made a terroristic threat when the student stated to a teacher "I'm going to get you" and "I'm going to kick your ____." The Court of Appeal found that the third and fourth element were not present and that the threat, on its face and under the circumstances in which it was made, was not so unequivocal, unconditional, immediate, and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution of the threat. The Court of Appeal also found that the threat did not cause the person threatened to reasonably be in sustained fear for his own safety. The Court based its conclusion on the fact that the police were not called until the following day and that the student was interviewed the following day in the school principal's office. The execution of the threat was not so immediate, the Court of Appeal held, since the police did not again interview the student until one week later. The Court of Appeal characterized the student's statements as intemperate, rude, and insolent and held that Section 422 prohibiting terroristic threats had not been violated. However, the Court did not rule that the student's statements could not be considered threats pursuant to Education Code section 48900(a)(1) for purposes of suspension and expulsion.[234]

The Ricky T. and In re George T. cases illustrate that not every threat of violence will rise to the level of a criminal threat or terroristic threat under Penal Code section 422 or Education Code section 48900.7. Each threat must be evaluated on an individual basis. Districts need not establish a violation of Penal Code section 422 or Education Code section 48900.7 to suspend or expel a student under Education Code section 48900(a)(1).

Districts should continue to take threats of violence seriously and investigate all threats thoroughly. Statements (for purposes of suspension and expulsion) will be considered threats if a reasonable person would foresee that the statement would be interpreted by the person to whom the statement is made as a serious expression of intent to harm or assault. Such statements would be violations of Education Code section 48900(a)(1) and students may be suspended or expelled for making such statements.

## P. Student Speech Ridiculing Other Students

The courts have had more difficulty dealing with student speech that does not rise to a threat, but which ridicules or embarrasses other students. In some cases, the courts have upheld the school district's discipline of students and on other cases, the courts have ruled in favor of the students.

[233] Id. at 1136.
[234] Id. at 1135.

In J.C. v. Beverly Hills Unified School District,[235] the U.S. District Court held that the school district violated the free speech rights of the student when it suspended the student in connection with the posting of a video clip on a website.

Plaintiff J.C. was a student at Beverly Vista High School in May 2008. On the afternoon of Tuesday, May 27, 2008, after the students had been dismissed from the school for the day, J.C. and several other students gathered at a local restaurant and recorded a four minute and 36 second video of the students talking. The video was recorded on J.C.'s personal video recording device. The video shows J.C. and her friends talking about a classmate of theirs, C.C. One of J.C.'s friends calls C.C. a "slut," "spoiled," and uses profanity during the recording. J.C.'s friends also called C.C. "the ugliest piece of s____ I've ever seen in my whole life."[236]

That same evening, J.C. posted the video on the website You Tube from her home computer. While at home that evening, J.C. contacted five to ten students from the school and told them to look at the video on You Tube. She also contacted C.C. and informed her of the video. C.C. told her mother and they brought the video to school the next day.[237]

J.C. estimated that about 15 people saw the video that night. The video received 90 hits on the evening of May 27, 2008, many from J.C. herself.[238]

On May 28, 2008, at the start of the school day, J.C. overheard ten students discussing the video on campus. C.C. was very upset about the video and came to the school with her mother and spoke with the school counselor. C.C. was crying and told the counselor that she did not want to go to class. C.C. said she was humiliated and hurt. The counselor spent 20-25 minutes counseling C.C. and convincing her to go to class. C.C. did return to class and the record indicates that she likely missed only part of a single class that morning.[239]

School administrators then investigated the making of the video. The administrators called J.C. to the administrative office to write a statement about the video and demanded that J.C. delete the video from You Tube and from her home computer. School administrators questioned the other students in the video and asked each of them to make a written statement about the video.[240]

The administrators contacted the principal about the video and then suspended J.C. for two days. No disciplinary action was taken against the other students in the video.[241]

J.C. had a prior history of videotaping teachers at the school. In April 2008, J.C. was suspended for secretly videotaping her teachers and was told not to make further videotapes on

[235] 711 F.Supp.2d 1094, 260 Ed. Law Rep. 212 (C.D. Cal. 2010).
[236] Id. at 1097-98.
[237] Id. at 1098.
[238] Ibid.
[239] Ibid.
[240] Id. at 1098-99.
[241] Id. at 1099.

campus. During the investigation about the You Tube video on May 28, 2008, school administrators also discovered another video posted by J.C. on You Tube of two friends talking on campus.[242]

Students at the school cannot access You Tube or other social networking websites on the school's computers as those websites are blocked by means of a filter. Certain cell phones can access the internet, including the You Tube website, but students are not allowed to use their cell phones at school. No evidence was presented to the court that any student viewed the You Tube video on their cell phone while at school.[243]

The court found that there was insufficient evidence to show actual disruption or the possibility of disruption. The court also ruled that the defendants were entitled to qualified immunity since the law was not clearly established at the time of the violation as to whether a reasonable official would know that their actions violated the students' First Amendment rights.[244]

In J.S. v. Blue Mountain School District,[245] and Layshock v. Hermitage School District,[246] the Third Circuit Court of Appeals ruled that the school districts involved violated the First Amendment rights of the students.

In J.S., an eighth grade student created a fake profile of her middle school principal on MySpace. The profile contained a principal's official photograph from the district's website and contained crude contact and vulgar language suggesting that the principal engage in sexual activities in his office and made sexual advances towards students and parents. The profile contained insulting comments about the principal's wife and child. The profile was publically accessible for one day and then J.S. changed it to a private setting which limited access to J.S.'s friends which included about 22 students who attended the school.[247]

The district's computers blocked access to MySpace so no Blue Mountain students viewed the profile from school computers. When the principal learned of the profile he asked the student to bring him a print out and the student complied. Both J.S. and the other student who created the profile were suspended for ten days. The district alleged that there were general rumblings at the school regarding the profile and that on several occasions student discussed the profile in class.[248]

J.S. filed a lawsuit against the school district alleging that the suspension violated J.S' First Amendment rights. The Court of Appeals held that the profile created by J.S. and her friend would not cause a reasonable person to forecast substantial disruption to the school.[249] The court stated:

> "Turning to our record, J.S. created the profile as a joke, and she took steps to make it 'private' so that access was limited to her

[242] Ibid.
[243] Ibid.
[244] Id. at 1124-26.
[245] 603 F.3d 915, 271 Ed.Law Rep. 656 (3rd Cir. 2011).
[246] 650 F.3d 205, 271 Ed.Law Rep. 638 (3rd Cir. 2011).
[247] Id. at 920-21.
[248] Id. at 921.
[249] Id. at 923.

> and her friends. Although, the profile contained McGonigle's picture from the school's website, the profile did not identify him by name, school, or location. Moreover, the profile, though indisputably vulgar, was so juvenile and nonsensical that no reasonable person could take its content seriously, and the record clearly demonstrates that no one did. Also, the School District's computers block access to MySpace, so no Blue Mountain student was ever able to view the profile from school. And the only printout of the profile that was ever brought to school was one that was brought at McGonigle's request. Thus, beyond general rumblings, a few minutes of talking in class, and some officials rearranging their schedules to assist McGonigle in dealing with the profile, no disruptions occurred.
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> "In comparing our record to the record in Tinker, this Court cannot apply Tinker's holding to justify the School District's actions in this case. As the Supreme Court has admonished, an 'undifferentiated fear of apprehension of disturbance is not enough to overcome the right to freedom of expression.'"[250]

In Layshock, a twelfth grade student used a computer at his grandmother's house to create a "parody profile" of the principal on MySpace. The profile made fun of the principal's size and called the principal a "big steroid freak" and accused the principal of stealing beer and shoplifting from K-Mart. The profile also contained several sexual comments and a photograph of the principal copied from the district's website. The student permitted access to the profile by listing other students in the district as friends on the MySpace page. Most of the school student body viewed the profile on non-school computers, but on two occasions students viewed the profile from school including one occasion in which the student accessed the site and shared it with other students at school.[251]

When school administrators learned of the parody, they suspended Justin for ten days, banned him from all extracurricular activities, and prohibited him from participating in the graduation ceremony. The student's parents filed suit against the school district alleging a violation of the student's First Amendment rights. The U.S. District Court ruled that a school district may discipline a student for speech only if there is a sufficient nexus between the student's speech and a substantial disruption of the school environment. The district court found no such nexus and the school district appealed.[252]

On appeal, the Court of Appeals affirmed the lower court's decision and stated:

> "We realize, of course, that it is now well established that Tinker's 'schoolhouse gate' is not constructed solely of bricks and mortar surrounding the school yard. Nevertheless, the concept of the

[250] Id. at 929.
[251] Id. at 207-08.
[252] Id. at 208-11.

> 'school yard' is not without boundaries and the reach of school authorities is not without limits…
>
> "It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities. Allowing the District to punish Justin for conduct he engaged in using his grandmother's computer would create just such a precedent, and we therefore conclude that the district court correctly ruled that the District's response to Justin's expressive conduct violated the First Amendment guarantee of free expression."[253]

The Court of Appeals in Layshock also rejected the district's argument by accessing the profile at school on one occasion, the profile was transformed to on campus speech. The Court of Appeals also rejected the school's argument that the school district's jurisdiction reaches the Internet when the speech is vulgar or lewd. The Court of Appeals held that unless the off-campus speech causes substantial disruption in school, the school district has no authority to discipline the student. The Court of Appeals distinguished the student's conduct from cases in which courts have upheld discipline for student speech that contain violent statements or pictures relating to school employees and therefore caused significant disruption at school.[254]

In contrast, in Kowalski v. Berkeley County Schools,[255] the Fourth Circuit Court of Appeals upheld the suspension of a high school student for creating and posting to a webpage, information that ridiculed a fellow student. The Court of Appeals held that a school district did not violate the student's free speech rights by suspending her.

The Court of Appeals held that although the conduct occurred off campus on the student's home computer, it was foreseeable that the expression would reach the school, and that the student's conduct involved substantial disruption and interference with the work and discipline of the school. The webpage contained inflammatory accusations, insulting comments, and doctored photographs that were directed against a classmate and invited other students to view the website.[256]

The Court of Appeals held that public schools have a compelling interest in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying. The Court of Appeals found the conduct to be disruptive and upheld the suspension of the student.[257]

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[253] Id. at 216.
[254] Id. at 216-18.
[255] 652 F.3d 565, 271 Ed.Law Rep. 207 (4th Cir. 2011).
[256] Id. at 571. See, Tinker v. Independent Community School District, 393 U.S. 503, 506, 89 S.Ct. 733 (1969).
[257] Id. at 571-77. See, also, De John v. Temple University, 537 F.3d 301, 319-20 (3rd Cir. 2008).

## Q. Depictions of Violence

In Robbins v. Regents of the University of California,[258] the Court of Appeal held that the creation of a video by students, depicting violent behavior by students against students, was not protected by the First Amendment. Therefore, suspending students from the 4-H Club pending an investigation was not a violation of the students' free speech rights. This decision provides additional guidance in defining the difficult line between protected and unprotected speech by secondary students.

The plaintiffs were two minor students who were members of a 4-H Club (which stands for Head, Heart, Hands, and Health), a program of the United States Department of Agriculture. The purpose of 4-H is to "assist children in developing as community leaders and involving themselves in community-based action in positive ways." In California, the 4-H Program is administered by the University of California's Cooperative Extension.[259]

The dispute arose when, in 2000 and 2001, several members of a Los Angeles based 4-H Club participated in a filmmaking project. Working with an adult advisor, the students wrote, acted in, and filmed a video in which two teenagers who had been picked on and teased by other teenagers go to a party attended by the other teenagers and kill them with machete-type knives. The 4-H Club members then submitted the video to the San Fernando Valley Fair for judging.[260]

Subsequently, the Board of Directors of the Fair notified 4-H that a video had been submitted which the Board refused to judge due to its violent content. The Board released a copy of the video to the Los Angeles County 4-H Administrator, who, after viewing the video, became concerned that the students who made the video may be at risk of committing actual violent behavior. After taking other preliminary actions, the Administrator suspended from the Club those members involved in making the video, pending a comprehensive investigation into the making of the video. The investigation included interviewing 4-H members who agreed to be interviewed, by experts in the field of law enforcement and youth violence. Within less than a month, the suspensions of all of the members who came forward to be interviewed had been lifted.[261]

Two students, rather than agreeing to be interviewed, filed a lawsuit against the Regents of the University of California and the Program Administrator, alleging violations of their rights to freedom of expression, freedom of association, and due process under the federal Constitution. They sought a temporary restraining order and a preliminary injunction barring the suspensions, which the trial court denied. The trial court subsequently dismissed the case against the Regents, on the grounds that they are immune from suit under the Eleventh Amendment to the U.S. Constitution, and the Program Administrator subsequently filed a summary judgment motion. In the motion, the Administrator claimed that she was entitled to "qualified immunity." Finding that

[258] 127 Cal.App.4th 653, 25 Cal.Rptr.3d 851, 196 Ed.Law Rep. (2005).
[259] Id. at 656.
[260] Id. at 657.
[261] Ibid.

there was "no evidence of a violation of any constitutional right," the trial court granted the Administrator's motion and dismissed the lawsuit. The students appealed.[262]

In this case, the court found that no constitutional right was violated. In reaching this conclusion, the California appellate court relied heavily on the federal Ninth Circuit Court of Appeals decision in LaVine v. Blaine School District.[263] In LaVine, the appellate court upheld the decision of a school administrator to temporarily expel a student after the student wrote a violent poem, while the school determined whether the student posed a threat to the safety of himself or others at the school. The court discussed the delicate balance between the individual constitutional rights of students and the rights of students to attend a safe public school environment, and emphasized that the recent spate of school shootings has raised the significance of the latter.[264]

## R. Disruptive T-Shirt

The facts in Sypniewski v. Warren Hills Regional Board of Education[265] illustrate how difficult it can be to determine whether particular speech or conduct or the wearing of a particular t-shirt will be disruptive.

In Sypniewski, the student challenged the school district's racial harassment policy alleging that it violated a student's First Amendment free speech rights. The policy was enacted in response to a pattern of disturbing racial incidents that had occurred in the school district. Shortly thereafter, the student was suspended from school for wearing a Jeff Foxworthy t-shirt inscribed with "redneck" jokes. Prior to this incident, the student acknowledged that he wore t-shirts displaying Confederate flags. School officials believed that student was previously pictured in a t-shirt that stated, "Not only am I perfect, I'm a redneck too" imposed over a Confederate flag and that the student was also affiliated with a group called the Hicks. The Hicks were believed to be associated with White Supremacist groups. The t-shirt the student wore contained the following text:

> "Top 10 reasons you might be a Redneck Sports Fan:
>
> 10. You've ever been shirtless at a freezing football game.
>
> 9. Your carpet used to be part of a football field.
>
> 8. Your basketball hoop used to be a fishing net.
>
> 7. There is a roll of duct tape in your golf bag.
>
> 6. You know the Hooter's menu by heart.

[262] Id. at 658-59.
[263] 257 F.3d 981 (9th Cir. 2001).
[264] Id. at 661-64.
[265] 307 F.3d 243, 170 Ed.Law Rep. 83 (3rd Cir. 2002).

5. Your mama is banned from the front row at wrestling matches.

4. Your bowling team has its own fight song.

3. You think the "Bud Bowl" is real.

2. You wear a baseball cap to bed.

1. You've ever told your bookie 'I was just kidding.'"[266]

The Third Circuit Court of Appeals in Sypniewski noted that several cases addressed public school attempts to restrict the display of Confederate flags and that the courts have upheld such bans as constitutional where there is evidence of a sufficient likelihood of substantial disruption. The court noted that in Sypniewski the substantial evidence of prior disruption related to the Confederate flag and that the District Court's factual findings would likely support a ban of displays of the Confederate flag under Tinker but the plaintiffs have not challenged a ban on the Confederate flag but have challenged the banning of a t-shirt that bore no Confederate flag and had no similarly disruptive history.[267]

The student presented evidence to show that he had worn the Foxworthy t-shirt several times without incident. The court noted that the expectation of disruption would most likely be well founded where there has been past incidents arising out of similar speech and that there were serious disruptive incidents in the school district over a two year period before the decision to ban the Foxworthy t-shirt that would have justified banning a range of related expression. However, the court indicated that it must determine whether the range was broad enough to encompass the Foxworthy t-shirt and indicated that the question is whether those incidents involved sufficiently similar or otherwise related speech to permit an inference of substantial disruption from the Foxworthy t-shirt.[268]

The Court of Appeals, after reviewing the evidence, determined that, at best, the evidence is conflicting with respect to the direct association of the term "redneck" with the racial hostility and the troublemakers previously identified by the school. The Court of Appeals noted that the evidence was ambiguous as to whether the Hicks and rednecks were associated or that the word "redneck" has been used to harass or intimidate or otherwise offend other students. The court noted that the word "redneck" overlaid with a Confederate flag on a t-shirt does not make the word "redneck" offensive.[269] The Court of Appeals stated:

> "When a school seeks to suppress a term merely related to an expression that has proven to be disruptive, it must do more than simply point to a general association. It must point to a particular and concrete basis for concluding that the association is strong enough to

[266] Id. at 246-50.
[267] Id. at 253-58.
[268] Id. at 254-255.
[269] Id. at 255-57.

> give rise to a well-founded fear of genuine disruption in the form of substantially interfering with school operations or with the rights of others. In other words, it is not enough that speech is generally similar to speech involved in past incidents of disruption, it must be similar in the right way. Most commonly, the prior speech will have played an offensive or provocative meaning, and the similar speech will have a similar meaning. But this sense of "similarity" cannot justify the ban here. The most plausible kind of similarity that would permit such an inference would be that the word 'redneck' was akin to a gang symbol identifying the Hicks, or clearly promoting their activities. But as discussed, the record does not support such a conclusion, and the District Court made no such findings. . . .The District Court erred in employing too broad a notion of "similarity" – a conception that does not provide a sufficient basis for permitting a 'well-founded' inference of disruption."[270]

In Sypniewski, the Court of Appeals went on to state that the district's policy was overbroad in that it prohibited speech that was not subject to regulation under Tinker. The Court of Appeals concluded:

> "The need to respect the rights of students requires a careful balancing. On the one hand, speech codes are disfavored for a tendency to interfere with or silence protected speech. Students should not be prevented from engaging in nondisruptive speech. But when there is a concrete basis – ordinarily established by a history of disruption and interference with the legitimate rights of other students – for concluding that certain expression presents a well-founded fear of disruption, a school should be free to address the issue by adopting a formal policy, so long as the policy narrowly targets the identified problems. When policies focus broadly on the listeners' reactions, without providing a basis for limiting the application to disruptive expression, they are likely to cover a substantial amount of protected speech. Here, the inclusion of the phrase 'creates ill will' causes just such a problem."[271]

In Harper v. Poway Unified School District,[272] the Court of Appeals held that a school district could prohibit a student from wearing a t-shirt with a message that condemned and denigrated other students on the basis of their sexual orientation.

The student, a sophomore at Poway High School, was ordered not to wear a t-shirt to school that read, "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" hand-written on the front, and "HOMOSEXUALITY IS SHAMEFUL" hand-written on the back.

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[270] Id. at 257-258.
[271] Id. at 268-269.
[272] 445 F.3d 1166, 208 Ed.Law Rep. 164 (9th Cir. 2006).

The student sought a preliminary injunction from the United States District Court ordering the school district to allow him to wear the t-shirt to school. The United States District Court denied the request for preliminary injunction and the Court of Appeals affirmed, upholding the right of the school district to prohibit the student from wearing the offending t-shirt.[273]

A teacher, an assistant principal, a school resource officer and the principal talked with the student about the t-shirt and advised the student that he could return to class if he took off the t-shirt. The student refused to remove the t-shirt and the student was required to remain in the office for the school day but was not suspended. The principal told the student that the t-shirt was inflammatory and that the school wanted to avoid physical conflict on campus. The principal also told the student that it was not healthy for students to be addressed in such a derogatory manner.[274]

The Court of Appeals noted that under Tinker v. Des Moines Independent Community School District,[275] the United States Supreme Court held that students do not shed their constitutional rights to freedom of speech or expression at the school house gate.[276] The Supreme Court also held in Tinker that the First Amendment rights of students in public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment. The Court of Appeals held that Harper's t-shirt must be viewed in light of the special circumstances of public schools. Under Tinker, the Court of Appeals noted that the U.S. Supreme Court has held that school districts may regulate student speech if it impinges upon the rights of other students,[277] or would result in a substantial disruption of or material interference with school activities.[278]

The Court of Appeals found that Harper's t-shirt would impinge upon the rights of other students and collides with their right to be secure and to be let alone.[279] The Court of Appeals noted that the Tenth Circuit Court of Appeals had held that the display of the Confederate flag would interfere with the rights of other students to be secure and let alone, and concluded that the student's wearing of his t-shirt collides with the rights of other students as well.[280]

The Court of Appeals noted that public school students may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, and have a right to be free from such attacks while on school campuses. Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self worth and their rightful place in society.[281]

The Court of Appeals noted that because minors are subject to mandatory attendance requirements, students are powerless to avoid these verbal assaults and are, in effect, a captive

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[273] Id. at 1171-72.
[274] Id. at 1172.
[244] 393 U.S. 503, 89 S.Ct. 733 (1969).
[276] Id. at 506.
[277] Id. at 509.
[278] Id. at 514.
[279] See, Tinker v. Des Moines Independent School District, 393 U.S. 503, 508 (1969).
[280] See, West v. Derby Unified School District, 206 F.3d 1358, 1366 (10th Cir. 2000).
[281] 445 F.3d 1166, 1182 (9th Cir. 2006).

audience. The court noted that studies demonstrate that academic underachievement, truancy and high drop out rates are prevalent among minority groups that have been historically oppressed and subjected to verbal and physical abuse. The court reasoned that attacks on students on the basis of their race, ethnicity, or sexual orientation are harmful not only to the students' health and welfare but also to their educational performance and their ultimate potential for success in life. Therefore, the court concluded that those who administer public educational institutions need not tolerate verbal assaults that may destroy the self esteem of vulnerable teenagers and interfere with their educational development. The Court of Appeals held that the school district had a valid and lawful basis for restricting the student's wearing of his t-shirt on the ground that his conduct was injurious to other students and interfered with their right to learn.[282]

The Court of Appeals also held that t-shirts which contained political slogans which do not denigrate minority groups but merely indicate a political disagreement with a particular point of view can not be prohibited by a school district. The court limited its holding to injurious speech that strikes at a core identifying characteristic of students on the basis of their membership in a minority group. Anti-war slogans and speech that supports or opposes the government's position in Iraq, would not invade the rights of others and could not be prohibited by a school district. The Court of Appeals concluded:

> "Accordingly, we limit our holding to instances of derogatory and injurious remarks directed at students' minority status such as race, religion, and sexual orientation. Moreover, our decision is based not only on the type and degree of injury the speech involved causes impressionable young people, but on the locale in which it takes place. . . . Thus, it is limited to conduct that occurs in public high schools (and in elementary school)." [283]

The Court of Appeals specifically stated that its holding does not apply to colleges and universities. The Court of Appeals rejected the student's claims that the school district had engaged in viewpoint discrimination in violation of the First Amendment or that the school district had violated the Free Exercise Clause or Establishment Clause of the First Amendment.[284]

In summary, the decision recognizes the unique environment of elementary and secondary public schools and allows school officials to prohibit injurious speech that intrudes upon the rights of other students.

## S. "Be Happy, Not Gay" T-Shirt

In Nuxoll v. Indian Prairie School District,[285] the Seventh Circuit Court of Appeals held that the school district had not sufficiently justified why a student could not wear a t-shirt bearing a "Be

[282] The Court of Appeals recognized that California law explicitly recognizes the right of students to be free from harassment on the basis of sexual orientation pursuant to California Education Code sections 200, 201.
[283] Id. at 1183.
[284] Id. at 1183-86.
[285] 523 F.3d 668, 231 Ed.Law Rep. 618 (7th Cir. 2008).

Happy, Not Gay" slogan. The Court of Appeals held that the student was entitled to a preliminary injunction enjoining the school district from applying the challenged rule to bar the student from wearing t-shirts that recited the slogan, "Be Happy, Not Gay."

The plaintiff, a sophomore at a public high school in Naperville, Illinois, brought suit against the school district alleging that his free speech rights were violated by forbidding him to make negative comments at school about homosexuality. The student sought to protest the "Day of Silence" sponsored by gay and lesbian groups to draw attention to the harassment of homosexuals. School officials placed a ban on the t-shirt based on school rules forbidding derogatory comments that refer to race, ethnicity, religion, gender, sexual orientation, or disability. The school deemed the "Be Happy, Not Gay" message to be a derogatory comment about a particular sexual orientation.[286]

The Court of Appeals reviewed prior case law and determined that it was enough for the school to present facts that might reasonably lead school officials to forecast substantial disruption. The court indicated that if the students wore t-shirts which directly disparaged blacks, women, or other minorities, it could lead to a decline in student's test scores, an upsurge in truancy, or other symptoms of a "sick school" and would therefore constitute substantial disruption and the school could prevent the speech. Therefore, the Court of Appeals upheld the school's rules in that they maintain a civilized student environment conducive to learning.[287]

However, the Court of Appeals was unconvinced that the student's t-shirt was sufficiently negative as to violate the policy. The Court of Appeals indicated that if the t-shirt had indicated "Homosexuals are Going to Hell" it would clearly violate the policy and not be protected by the First Amendment. However, a positive message such as "Be Happy, Be Straight" would, most likely, not violate the policy against making disparaging comment about sexual orientation. The Court of Appeals characterized the slogan "Be Happy, Not Gay" as only tepidly negative and not sufficiently derogatory or demeaning as to violate the policy.[288]

In Zamecnik v. Indian Prairie School District #204,[289] the Seventh Circuit Court of Appeals upheld the district court's granting of a permanent injunction and nominal damages of $25 for each student being precluded by a high school from displaying their messages on certain days.

This appeal is the sequel to an appeal decided by the Seventh Circuit in Nuxoll v. Indian Prairie School District #204.[290] In Nuxoll, the plaintiffs, two students at Neuqua Valley High School

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[286] Id. at 669.

[287] Id. at 673; citing Boucher v. School Board of the School District of Greenfield, 134 F.3d 821, 827-28 (7th Cir. 1998); Walker – Serrano v. Leonard, 325 F.3d 412, 175 Ed.Law Rep. 93 (3rd Cir. 2003); LaVine v. Blaine School District, 257 F.3d 981, 989 (9th Cir. 2001).

[288] See, also, Smith v. Novato Unified School District, 150 Cal.App.4th 1339, 59 Cal.Rptr.3d 508, 220 Ed.Law Rep. 292 (2007), in which the California Court of Appeal held that an editorial in a student newspaper criticizing illegal immigration was protected speech under the First Amendment of the United States Constitution and state law. It should be noted that the California Court of Appeal based its decision on both First Amendment grounds and state law. It should be noted that California courts have held that California Education Code section 48907 grants students greater free speech rights than the First Amendment. See Leeb v. Delong, 243 Cal.Rptr. 494, 198 Cal.App.3d 47, 44 Ed.Law Rep. 444 (1988); Lopez v. Tulare Joint Union High School District, 34 Cal.App.4th 1302, 40 Cal.Rptr.2d 762, 99 Ed.Law Rep. 1018 (1995).

[289] 636 F.3d 874, 266 Ed.Law Rep. 62 (7th Cir. 2011).

[290] 523 F.3d 668 (7th Cir. 2008).

in Naperville, Illinois, had sued the school district for infringing their right of free speech by forbidding them from making a specific negative statement about homosexuality. The students moved for a preliminary injunction which the district judge denied. The students appealed and the Seventh Circuit Court of Appeals reversed directing the district judge to enter forthwith a preliminary injunction that would permit plaintiff Nuxoll to wear during school hours a t-shirt that stated, "Be Happy, Not Gay."[291]

The controversy arose from an event called the Day of Silence that is intended to draw critical attention to harassment of homosexuals. Some students and faculty wore t-shirts on the Day of Silence that displayed slogans such as, "Be Who You Are." None of the slogans criticized heterosexuality or advocated homosexuality.[292]

The plaintiffs, who disapproved of homosexuality on religious grounds, participated with other students in a Day of Truth, held on the first school day after the Day of Silence. Plaintiff Zamecnik wore a t-shirt which stated, "Be Happy, Not Gay" on the back. A school official inked out the phrase "Not Gay" and banned the display of the slogan as a violation of a school rule forbidding derogatory comments spoken or written that refer to race, ethnicity, religion, gender, sexual orientation, or disability.[293]

The plaintiffs asserted a constitutional right to make negative statements about members of any group provided that the statements are not inflammatory or fighting words which might provoke a violent response amounting to a breach of the peace.[294] The plaintiffs concede that they could not wear a t-shirt that stated "homosexuals go to Hell" because those are fighting words, at least in a high school setting, and so could be prohibited despite the fact that they are speech.[295]

The Court of Appeals held that a school that permits advocacy of the rights of homosexual students cannot be allowed to stifle criticism of homosexuality. The school district argued that banning "Be Happy, Not Gay" was just a matter of protecting the rights of students against whom derogatory comments are directed. The Court of Appeals held that the "Be Happy, Not Gay" slogan was not fighting words and that the school district provided no factual basis for showing substantial disruption.[296] The Court of Appeals held that in a factual vacuum, the phrase "Be Happy, Not Gay" appeared to the court as only tepidly negative and the court did not find the phrase to be derogatory or demeaning. The Court of Appeals noted that cases that have found speech to be disruptive or offensive involve factual situations that were much more extreme.[297]

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[291] 636 F.3d 874, 875 (7th Cir. 2011).
[292] Id. at 875-76.
[293] Id. at 876-77.
[294] See, Chaplinsky v. New Hampshire, 315 U.S. 568, 572-73, 62 S.Ct. 766 (1942).
[295] See, R.A. v. City of St. Paul, 505 U.S. 377, 386, 112 S.Ct. 2538 (1992).
[296] See, Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 514, 89 S.Ct. 733 (1969); Boucher v. School Board of School District of Greenfield, 134 F.3d 821, 827-828 (7th Cir. 1998); Walker-Serrano v. Leonard, 325 F.3d 412, 416 (3rd Cir. 2003); LaVine v. Blaine School District, 257 F.3d 981, 989 (9th Cir. 2001).
[297] See, Canady v. Bossier Parish School Board, 240 F.3d 437, 442 (5th Cir. 2001); Defoe v. Spiva, 625 F.3d 324, 333-36 (6th Cir. 2010); Scott v. School Board of Alachua County, 324 F.3d 1246, 1248-49 (11th Cir. 2003); West v. Derby Unified School District, 206 F.3d 1358, 1361, 1365-66 (10th Cir. 2000); Boroff v. Van Wert City Board of Education, 220 F.3d 465, 467, 469-71 (6th Cir. 2000).

The preliminary injunction issued on remand permitted Nuxoll to wear, during school hours, a t-shirt that stated "Be Happy, Not Gay." The district judge granted summary judgment in favor of the plaintiffs, awarding each of them $25 in damages for the infringement of their constitutional rights. The district court later entered a permanent injunction, which differed from the preliminary injunction in that it included all students and was not limited to t-shirts but applied to clothing or personal items.[298]

The Court of Appeals rejected the challenge of the school district to the $25 damages. The Court of Appeals held that the award was justified in that both plaintiffs were injured, though only slightly, by the school district's violation of their constitutional rights.[299]

## T. Bracelets Commenting on Political or Social Issue

In B.H. v. Easton Area School District,[300] the Third Circuit Court of Appeals held that a school district could not restrict speech that could plausibly be interpreted as commenting on any political or social issue. The Court of Appeal held that under the First Amendment, the speech was protected.

In B.H., the middle-school students purchased bracelets bearing the slogan, "I – Boobies! (KEEP A BREAST)" as part of a nationally-recognized breast cancer awareness campaign. The Easton Area School District banned the bracelets, claiming that the bracelets contained vulgar, lewd, profane, or plainly offensive speech. The district court held that the ban violated the students' rights to free speech under the First Amendment and issued a preliminary injunction against the ban. The Court of Appeals affirmed.[301]

## U. Refusal to Board Bus

In Pinard v. Clatskanie School District,[302] the Court of Appeals held that the refusal of members of the basketball team to board a team bus for an away game was not protected speech under the First Amendment. The Court of Appeals held that the refusal to board the bus caused disruption of the basketball program and therefore was not protected speech under Tinker.

The case arose from a school district suspension of the members of the basketball team. The students filed an action alleging that the school district suspended the athletes for engaging in constitutionally protected speech by circulating a petition against the basketball coach and refusing to board the bus. The District Court granted summary judgment in favor of the school district. The Court of Appeals agreed with the District Court that the students' refusal to board the bus was not protected by the First Amendment because it substantially disrupted and materially interfered with

[298] 636 F.3d 874, 879-881.
[299] Id. at 881-82.
[300] 725 F.3d 293, 296 Ed.Law Rep. 752 (3rd Cir. 2013).
[301] Id. at 298.
[302] 467 F.3d 755, 213 Ed.Law Rep. 952 (9th Cir. 2006).

the operation of the basketball program. However, the Court of Appeals reversed in part on the basis that the school district may have retaliated against the students for circulating the petition.[303]

The Court of Appeals ruled that based on Tinker, the First Amendment protects the basketball players' petition and their complaints regarding the coach. The Court of Appeals stated:

> "In this case, unlike in Tinker, there is undisputed evidence to support the District Court's explicit finding that the plaintiff's refusal to board the bus for the away game 'materially disrupted the operation of the boys' varsity basketball team.' As a general matter, school districts spend much time and money scheduling and hosting their extracurricular events – part of the school's educational program – which involved the coordination of multiple school officials, students, parents, and often times volunteers, referees and bus drivers. Here, there is no dispute that the plaintiffs constituted all but three members of the varsity team. Similarly, it is undisputed that the boycotted event was a regularly scheduled out of town game against a rival school, part of the school's varsity basketball program, that the varsity team was scheduled to travel to the game on the school bus and that the plaintiffs refused to board the bus only a few hours before the game was scheduled to begin. The last minute boycott of a regularly scheduled game by nearly every member of the team forced the district either to play the game with replacement players or cancel the event. That the school succeeded in obtaining substitute players . . . may have mitigated the disruptive effects of the plaintiff's actions, but it did not eliminate them or render them less than substantial. . . .
>
> "Under these circumstances, the plaintiff's conduct plainly 'interrupted school activities' and 'intruded in the school's affairs.'"[304]

The Court of Appeals remanded the matter back to the District Court to determine whether the plaintiffs have offered evidence from which a reasonable jury could conclude that the petition and complaints against the coach were a substantial or motivating factor in the school's decision to suspend them permanently from the team. If the District Court so concludes, then the school district is not entitled to summary judgment unless it can show that the school district would have imposed a permanent suspension even in the absence of the plaintiff's petition and complaints against the coach.[305]

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[303] Id. at 758-59.
[304] Id. at 769-770.
[305] Id. at 771.

## V. Necessity to Prove Disruption

In K.A. v. Pocono Mountain School District,[306] the Court of Appeal held that under Tinker v. Des Moines Independent School District, the district failed to identify any disruption caused by an elementary school student's distribution of invitations to her classmates for a Christmas party at her church. The Court of Appeals held that the district policies relied upon in prohibiting the student's distribution of the invitations for a Christmas party were unconstitutional as applied.

K.A. was a fifth grade student at Barrett Elementary Center of the Pocono Mountain School District. In December 2010, K.A. wanted to hand out invitations to her classmates to a Christmas party at her church. The school normally allows elementary school students to pass out invitations to birthday parties, Halloween parties, Valentine's dances and similar events.

The U.S. District Court found that the school district failed to show that the passing out of the invitations would substantially disrupt the school environment or interfere with the rights of others. The Court of Appeals affirmed.

The Court of Appeals acknowledged that age is a crucial factor in determining First Amendment rights under Tinker. The Court of Appeals held that Tinker provides a flexible standard that is able to incorporate a number of considerations.[307] The Court of Appeals concluded that the Tinker analysis applies to elementary school students and the failure to identify any disruption caused by the students handing out invitations makes the school district's actions unconstitutional.[308]

## W. Inappropriate Speech of Student Seeking Teaching Certification

In Oyama v. University of Hawaii,[309] the Ninth Circuit Court of Appeals held that the University of Hawaii appropriately dismissed a student from the teacher certification program when the student spoke out in favor of making sexual relations between children and teachers and other adults legal.

The Ninth Circuit Court of Appeals held that in the context of a public university's professional certification program, the university may evaluate the student's speech, made in the course of the program, in determining the student's eligibility for certification without offending the First Amendment under certain circumstances. Because the University of Hawaii's decision to deny Oyama's student teaching application directly related to defined and established professional standards and was narrowly tailored to serve the university's core mission of evaluating Oyama's suitability for teaching and reflected reasonable professional judgment, the university did not violate Oyama's First Amendment rights. In addition, the university granted Oyama adequate procedural protections in denying his student teaching application and therefore did not violate Oyama's due process rights.[310]

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[306] 710 F.3d 99 (3rd Cir. 2013).
[307] Id. at 108.
[308] Id. at 113-114.
[309] 813 F3d.850 (9th Cir.2015).
[310] Id. at 875-876.

Therefore, the Ninth Circuit Court of Appeals upheld the District Court's grant of summary judgment in favor of the University of Hawaii.

## X. Cyberbullying and the First Amendment

In People v. Marquan M.,311 the Court of Appeal of the State of New York struck down a local law enacted by the Albany County Legislature making it a criminal offense to bully another individual over the Internet. The Court of Appeal held that the statute was overbroad and violated the Free Speech Clause of the First Amendment.

In 2010, the Albany County Legislature adopted a new crime, the offense of cyberbullying which was defined as:

> "Any act of communicating or causing a communication to be sent by mechanical or electronic means, including posting statements on the internet or through a computer or email network, disseminating embarrassing or sexually explicit photographs; disseminating private, personal, false or sexual information, or sending hate mail, with no legitimate private, personal, or public purpose, with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person."

The provision made it a misdemeanor, punishable by up to one year in jail and a $1,000 fine, for knowingly engaging in such conduct.

The defendant, a high school student, used Facebook to create a page bearing the pseudonym Cohoes Flame. The student anonymously posted photographs of high school classmates and other adolescents, with detailed descriptions of their alleged sexual practices and predilections, sexual partners, and other types of personal information. The descriptive captions were vulgar and offensive, and prompted responsive electronic messages that threatened the creator of the website with physical harm.

A police investigation revealed that the defendant was the author of the postings. He admitted his involvement and was charged with cyberbullying under the local law.

The Court of Appeal found that the language of the local law embraced a wide array of applications that prohibited types of protected speech far beyond the cyberbullying of children. The Court of Appeal refused to sever the provisions in the law and find part of the law valid.[312]

The Court held that the Albany County's local law was overbroad and facially invalid under the Free Speech Clause of the First Amendment.

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311 24 N.Y. 3d 1 (2014).
312 Id. at 10.

## Y. Summary of Free Speech Cases

Where the courts have found sufficient evidence of substantial disruption which might reasonably lead school district officials to forecast substantial disruption, the courts have upheld school district officials' suppression of student speech. For example, in Karp,[313] the court found that there was sufficient evidence of potential substantial disruption where students wanted to protest the dismissal of a popular teacher. District officials had evidence of a potential conflict between students who supported a walkout and students who opposed the walkout.

In Chandler,[314] the Court of Appeals remanded the matter back to the District Court to determine whether the wearing of "SCAB" buttons by students during a teacher strike would substantially disrupt or materially interfere with school activities. The court held that the buttons were not inherently disruptive but remanded the matter back to the District Court to determine whether the school district could produce additional evidence to show that school officials had sufficient facts to reasonably forecast substantial disruption or material interference.

In Boucher,[315] the Court of Appeals held that the student's article regarding the school computer system was a blueprint for the invasion of the school district's computer system. The Court of Appeals indicated that this article encouraged others to "hack" into the school computer system and as a result of the student's article the school district was required to retain the services of computer experts to conduct diagnostic tests on the school's computer system and change all the passwords mentioned in the article. The Court of Appeals found that this was sufficient disruption to justify discipline of the student.

In West v. Derby Unified School District,[316] the Court of Appeals found that there had been a history of disruption and substantial interference with school activities directly related to the display of the Confederate flag. The school district had convened a task force that proposed a policy to prohibit display of the Confederate flag and other symbols of White Power or Black Power as a way of avoiding divisive and disruptive activities. Given this historical background, the Court of Appeals upheld the District's policy and its discipline of the student who violated the policy by drawing a Confederate flag.

In LaVine v. Blaine School District,[317] the Court of Appeals held that a student's threatening poem had the potential for substantially disrupting school activities and school officials were justified in expelling the student until the student was examined by a psychiatrist and the psychiatrist determined that it was safe to return the student to school. In Pinard, the Court of Appeals held that the students' refusal to board a school bus a few hours before a basketball game was disruptive of school activities and materially interfered with the operation of the basketball program and therefore was not protected by the First Amendment.

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[313] Karp v. Becken, 477 F.2d 171 (9th Cir. 1973).
[314] Chandler v. McMinnville, 978 F.2d 524 (9th Cir. 1992).
[315] Boucher v. School Board of the School District of Greenfield, 134 F.3d 821 (7th Cir. 1998).
[316] 206 F.3d 1388 (10th Cir. 2000).
[317] 257 F.3d 981, 155 Ed.Law Rep. 1019 (9th Cir. 2001).

Conversely, in Sypniewski,[318] the Court of Appeals found that there was insufficient evidence of disruption and material interference with respect to a "redneck" t-shirt. The Court of Appeals found that there was an insufficient connection between the term "redneck" and the potential for disruption. The court noted in Sypniewski that there was a sufficient history of disruption at the school to justify the suppression or prohibition of the display of a Confederate flag. In Saxe, the Court of Appeals found that the anti-harassment policy was overbroad because there was no history of problems at the school and the policy prohibited speech that went beyond the substantial interference or disruption standard established in Tinker.

In Nuxoll,[319] the Court of Appeals found that the statement on a t-shirt, "Be Happy, Not Gay" was only tepidly negative and there was not sufficient evidence in the record to show that the t-shirt would lead to substantial disruption or material interference with the rights of other students.

In summary, conduct which is not lewd, vulgar or profane or which is not school-sponsored may be regulated only if it would substantially disrupt the educational process or materially interfere with the rights of other students. In future cases, as in the cases discussed above, the courts will closely scrutinize the facts to determine if the student's conduct substantially disrupts the operation of the school program or materially interferes with the rights of other students. School officials will continue to have a difficult task balancing the safety concerns of parents and students against the chilling of student free speech rights. The more solid the factual foundation shown by school officials of substantial disruption of school activities and material interference with the rights of other students, the more likely the courts will uphold actions by school officials to prohibit or suppress student speech.

## SCHOOL NEWSPAPERS

### A. U.S. Supreme Court

In Hazelwood School v. Kuhlmeier,[320] the United States Supreme Court reemphasized the limits of the First Amendment rights of speech and expression that students may exercise in the public schools. In Kuhlmeier, the United States Supreme Court held that the school officials had broad authority to regulate school newspapers.

The United States Supreme Court again stated that the rights of students in public schools are not automatically coextensive with the rights of adults in other settings. The United States Supreme Court found the circumstances in Kuhlmeier to be different than in Tinker. In Tinker, the school was only required to tolerate the student's speech, but in a school sponsored newspaper, it was affirmatively promoting a particular student's speech. The Supreme Court found that educators are entitled to exercise greater control over the second form of student expression to assure that

[318] Sypniewski v. Warren Hills Regional Board of Education, 307 F.3d 213 (3rd Cir. 2002).
[319] Nuxoll v. Indian Prairie School District, 523 F.3d 668 (7th Cir. 2008).
[320] 108 S.Ct. 562, 43 Ed.Law Rep. 515 (1988).

participants learn whatever lessons the activity is designed to teach as school newspapers are part of the curriculum.[321]

Therefore, a school district may, in its capacity as a publisher of a school newspaper or producer of a school play, edit student speech. The Supreme Court stated:

> ". . . We hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[322]

The United States Supreme Court went on to conclude that the principal from the Hazelwood School District acted reasonably in requiring the deletion of two articles on pregnancy and divorce. The principal had concluded that the student's anonymity was not adequately protected given the other identifying information in the pregnancy article and the small number of pregnant students at the school. The Court upheld the principal's conclusion that neither the pregnancy article nor the divorce article was suitable for publication in a high school newspaper.[323]

## B. California Law

In California, the Legislature, by statute, has limited the authority of school administrators to regulate school newspapers and has granted to students broader rights of freedom of speech and freedom of the press.[324] Education Code section 48907 states:

> "Students of the public schools shall have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges, and other insignia, and the right of expression in official publications, whether or not such publications or other means of expression are supported financially by the school or by use of school facilities, except that expression shall be prohibited which is obscene, libelous, or slanderous. Also prohibited shall be material which so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school.
>
> "Each governing board of a school district and each county board of education shall adopt rules and regulations in the form of a written publications code, which shall include reasonable provisions

[321] Ibid.
[322] Kuhlmeier at 571.
[323] Kuhlmeier at 571-572.
[324] Education Code section 48907; Stats.1983, ch. 498, section 91.

for the time, place, and manner of conducting such activities within its respective jurisdiction.

"Student editors of official school publications shall be responsible for assigning and editing the news, editorial, and feature content of their publications subject to the limitations of this section. However, it shall be the responsibility of a journalism adviser or advisers of student publications within each school to supervise the production of the student staff, to maintain professional standards of English and journalism, and to maintain the provisions of this section.

"There shall be no prior restraint of material prepared for official school publications except insofar as it violates this section. School officials shall have the burden of showing justification without undue delay prior to any limitation of student expression under this section.

"'Official school publications' refers to material produced by students in the journalism, newspaper, yearbook, or writing classes and distributed to the student body either free or for a fee.

"Nothing in this section shall prohibit or prevent any governing board of a school district from adopting otherwise valid rules and regulations relating to oral communication by students upon the premises of each school."[325]

This narrow grant of authority to regulate student expression was challenged by the American Civil Liberties Union in a lawsuit against the Garden Grove Unified School District.[326] The Court of Appeal upheld the authority of school officials to regulate school newspapers under Education Code section 48907 and noted that in the private sector, private publishers are responsible for their publications and ordinarily have unfettered control over the contents of their publications. The Court of Appeal also noted that aspiring authors and advertisers have no right to insist on the publication of their works and articles.[327]

The Court of Appeal also recognized the right of publishers to censor material that was potentially defamatory and which might subject them to liability.[328] The Court of Appeal stated:

"If Kuhlmeier were specifically applicable in California, little more would have to be said, but it is not. Section 48907 of the Education Code and California decisional authority clearly confer editorial control of the official student publications on the student

[325] Ibid.
[326] Leeb v. De Long, 198 Cal.App.3d 47 (1988).
[327] Leeb at 52.
[328] Leeb at 57-62.

> editors alone, with very limited exceptions. The broad power to censor expression in school sponsored publications for pedagogical purposes recognized in Kuhlmeier is not available to this state's educators. . . ."[329]

Therefore, in California, school officials have a limited right to regulate school newspapers in cases where the material is obscene, libelous, slanderous or creates a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations or creates a substantial disruption of the orderly operation of the school.[330] In all other cases, a school administrator in California does not have the authority to regulate the content of student newspapers. Therefore, most likely, a school principal in California could not have refused to allow the publication of the articles contained in the newspaper in Kuhlmeier given the broader constitutional rights that have been conferred upon students by the Legislature in California.[331]

## C. Profanity

In Lopez v. Tulare Joint Union High School District Board of Trustees,[332] the Court of Appeal held that a school principal may require students to delete profanity and four letter words from a student produced film under Education Code section 48907. The plaintiffs in the case were students at Valley High School, a continuation school in the Tulare Joint Union High School District. During the 1991/92 school year the students wrote and produced a film in connection with their film arts class. The film was intended to address the problems of teenage pregnancy and to depict a day in the life of teenage parents. The film contains, as part of the dialogue, a number of four letter words.

The students argued that the profanity made the film characters more realistic and convincing. The film arts class instructor thought that the sparse use of profanity in the script was appropriate. However, the school principal and the district superintendent found the language highly offensive and educationally unsuitable. The principal and superintendent directed the teacher to have the students remove the profanity from the script of the film.

The students appealed the administrators' decision to the school board. After public hearings, the board held that sound educational policy as well as the district administrative regulations require that the profanity in the film be deleted. The students, with the assistance of the American Civil Liberties Union, brought an action against the school district in superior court. The superior court, on motion for summary judgment, ruled in favor of the school district. The Court of Appeal affirmed. The majority opinion reviewed the history and statutory language of Education Code section 48907 and held that the school district had a responsibility to supervise the production of the student staff and to maintain professional standards of English and journalism.[333] Section 48907 states in part:

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[329] Leeb at 54.
[330] Education Code section 48907.
[331] Ibid.
[332] Lopez v. Tulare Joint Union High School District, 34 Cal.App.4th 1302 (1995).
[333] Ibid.

> ". . . it shall be the responsibility of a journalism advisor or advisors of student publications within each school to supervise the production of the student staff, to maintain professional standards of English and journalism, and to maintain the provisions of this section."[334]

The Court of Appeal held that these provisions applied to the production of the film as well. The Court of Appeal found that the legislative history showed that the Legislature intended to preclude the student(s) use of four letter words and profanity under the auspices of the professional standards of English and journalism provision. The Court of Appeal rejected the students' argument that the language restriction renders the film less effective in conveying their ideas because the film characters are more convincing and persuasive when they use profanity. The Court of Appeal noted that a ban on profanity makes the film more acceptable to a wider audience who may benefit from the ideas expressed in the film.

## SCHOOL UNIFORM POLICIES AND SCHOOL DRESS CODES

### A. Constitutionality of Dress Code

In Canady v. Bossier Parish School Board,[335] the Court of Appeals upheld the constitutionality of the school's dress code. The Court of Appeals held that the school district's dress code did not violate the First Amendment.

The Court of Appeals noted that the Louisiana Legislature authorized school boards in Louisiana the authority to implement mandatory school uniform policies. The statute requires that school boards give the students' parents written notice explaining the dress requirements.

In the 1998-1999 school year, the Bossier Parish School Board required 16 of its schools to adopt mandatory uniform policies in order to determine the effect of the uniforms on the learning environment. After receiving favorable results, the school board implemented mandatory school uniforms in all of the parish public schools beginning with the 1999-2000 school year. The uniforms consisted generally of a choice of two colors of polo or oxford shirts and navy or khaki pants. The schools alerted parents by letter of the dress specifications, provided a list of local stores supplying the required clothing, and displayed an example of the uniform at each school.

Several parents of students filed a lawsuit in federal court against the Bossier Parish school system, seeking an injunction against the school's enforcement of the uniform policy. The parents claim that the dress code violated their children's First Amendment rights to free speech.

Both the parents and the school board filed for summary judgment. The district court ruled in favor of the school board and the parents appealed.

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[334] Education Code section 48907.
[335] 240 F.3d 437 (5th Cir. 2001).

The Court of Appeals held that while a person's choice of clothing may be based solely on considerations of style and comfort, an individual's choice of attire also may be endowed with sufficient levels of intentional expression to elicit First Amendment protection.[336] The court noted that the Supreme Court recognized that conduct, coupled with communicative content, raises First Amendment concerns but does not safeguard a limitless variety of behavior. In deciding whether particular conduct possesses sufficient communicative elements to raise First Amendment concerns, courts must determine whether an intent to convey a particularized message is present, and whether it was likely that the message would be understood by those who viewed it.[337]

The Court of Appeals noted that a person's choice of clothing may include intentional expressions on many levels. In some cases, clothing functions as pure speech. For example, when a student chooses to wear shirts or jackets with written messages supporting political candidates or important social issues, the words printed on the clothing will qualify as pure speech and will be protected under the First Amendment.[338]

The Court of Appeals also noted that clothing may also symbolize ethnic heritage, religious beliefs, and political and social views. Individuals regularly use their clothing to express ideas and opinions, and students may wear color patterns or styles with the intent to express a particular message. The choice to wear clothing as a symbol, an opinion or cause is undoubtedly protected by the First Amendment if the message is likely to be viewed in that manner.[339]

The Court of Appeals noted that students in particular often choose their attire with the intent to signify the peer group to which they belong, their participation in different activities, and their general attitudes toward society and the school environment. Although this sort of expression may not convey a specific message to warrant First Amendment protection in every instance, the court noted that in some cases the choice of clothing may amount to protected speech.[340] While certain forms of expressive conduct and speech are protected under the First Amendment, constitutional protection is not absolute, especially in the public school setting. School boards, not federal courts, have the authority to decide what constitutes appropriate behavior and dress in public schools.[341]

The Court of Appeals noted that prior cases established three categories of student speech.[342] The first category involves school regulations directed at specific student viewpoints.[343] In Tinker v. Des Moines Independent School District, school officials suspended students for wearing black armbands in protest of the Vietnam War. The Supreme Court held that suppression of students' political expression could not be validated when the students' behavior did not disrupt the

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[336] Id. at 440.
[337] Id. at 440; citing Texas v. Johnson, 491 U.S. 397, 404, 109 S.Ct. 2533 (1989); Spence v. Washington, 418 U.S. 405, 410-411, 94 S.Ct. 2727 (1974).
[338] Id. at 440; citing Cohen v. California, 403 U.S. 15, 18, 91 S.Ct. 1780 (1971).
[339] Texas v. Johnson, 491 U.S. 397, 404, 109 S.Ct. 2533 (1989); Spence v. Washington, 418 U.S. 405, 410-411, 94 S.Ct. 2727 (1974).
[340] Id. at 441.
[341] Id. at 441, citing Bethel School District v. Fraser, 478 U.S. 675, 681, 106 S.Ct. 3159 (1986); Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 266-267, 108 S.Ct. 562 (1988).
[342] See, Chandler v. McMinnville School District, 978 F.2d 524 (9th Cir. 1992).
[343] Tinker v. Des Moines Independent School District, 393 U.S. 503, 89 S.Ct. 733 (1969).

educational environment. The court held that school officials must show that the students' speech would substantially interfere with the work of the school or infringe on the rights of other students.[344]

The second category of student expression involved lewd, vulgar, obscene, or plainly offensive speech. In Bethel School District v. Fraser, school officials suspended a student for delivering a nomination speech at a school assembly because the speech contained sexually explicit language that the school deemed inappropriate for the members of the audience. The court held that it was appropriate for educators to protect students from sexually explicit, indecent or lewd speech.[345]

The third category of student speech involved student expression that is related to school-sponsored activities. In Hazelwood School District v. Kuhlmeier, the students working on a high school newspaper sought injunctive relief against the school district and school officials. The students argued that their First Amendment rights were violated when school officials deleted certain newspaper articles related to pregnancy and the effects of divorce on the lives of students. The Supreme Court concluded that the Tinker analysis does not apply when the First Amendment requires a school to affirmatively promote particular student speech.[346] The court concluded that school officials could regulate school-sponsored activities, such as publications, theatrical productions, and other conduct related to the school's curriculum, if their actions are reasonably related to legitimate pedagogal concerns.[347]

The Court of Appeals determined that the issue of mandatory uniform policies did not fall into one of these three categories, and that the policy was viewpoint neutral on its face and as applied. Improving the educational process is undoubtedly an important issue to the school board. The school board's purpose for enacting the uniform policy is to increase test scores and reduce disciplinary problems throughout the school system. The court held that it is not the job of the federal courts to determine the most effective way to educate the nation's youth, and held that the students and parents did not raise an issue of fact as to whether the uniform policy furthers the improvement of education in the school system, and therefore, the Court of Appeals affirmed the district court's order granting summary judgment in favor of the school board.[348]

## B. Exemption from Dress Code

In Blau v. Fort Thomas Public School District,[349] the Court of Appeals held that the dress code adopted by a middle school did not violate the student's First Amendment right to freedom of expression. The court further held that the parent did not have a fundamental right to exempt his child from the dress code.

The Highlands Middle School in the Fort Thomas Public School District adopted a dress code following a parent meeting to create unity, strengthen school spirit and pride, and focus

[344] Id. at 509.
[345] Bethel School District v. Fraser, 478 U.S. 675, 677-679, 685, 106 S.Ct. 3159 (1986).
[346] Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 267, 270-273, 108 S.Ct. 562 (1988).
[347] Id. at 273.
[348] Canady v. Bossier Parish School Board, 240 F.3d 437, 444 (5th Cir. 2001).
[349] 401 F.3d 381, 196 Ed.Law Rep. 118 (6th Cir. 2005).

attention on learning and away from distractions. The proposal relied on other school districts' findings that dress codes had enhanced school safety, improved the learning environment, promoted good behavior, reduced discipline problems, improved test scores, improved children's self-respect and self-esteem, bridged socio-economic differences between families, helped eliminate stereotypes, and produced a cost savings for families.[350]

Following several meetings with parents, a dress code was adopted which restricted the following:

- Clothing that is too tight, revealing or baggy as well as tops and bottoms that do not overlap;
- Hats, caps, scarves, or sweatbands except on "special event days" such as "spirit" or "reward" days;
- Non-jewelry chains and chain wallets;
- Clothing that is "distressed" or has holes in it;
- Visible body piercing (other than ears);
- Unnaturally colored hair that is distracting to the educational process, including "blue, green, red, purple or orange" hair;
- Clothing that is too long, flip-flop sandals, or high platform shoes;
- Pants, shorts, or skirts that are not of a solid color of navy blue, black, any shade of khaki, or white;
- Shorts, skirts, or skorts that do not reach mid-thigh or longer;
- Bottoms made with stretch knits, flannel, or fleece, such as sweatpants, jogging pants, or any type of athletic clothing, as well as baggy, sagging, or form-fitting pants;
- Tops that are not a solid color and are not crew neck style, polo style with buttons, oxford style, or turtleneck;
- Tops with writing on them and logos larger than the size of a 'quarter' … except 'Highlands' logos or other 'Highlands Spirit Wear';
- Tops that are not of an appropriate size and fit; and

[350] Id. at 385.

- Form-fitting or baggy shirts or any material that is sheer, lightweight enough to be seen through.[351]

A lawsuit was filed in U.S. District Court alleging that the adoption of the policy violated the First Amendment rights of the students but did not indicate that the student wished to convey, through her clothing, a particular message. The complaint stated that the student opposed the dress code because she wanted to be able to wear clothes that looked nice on her, that she feels good in, and that express her individuality.[352]

The Court of Appeals noted that the protections of the First Amendment do not generally apply to conduct in and of itself. To bring a free speech claim regarding action rather than words, the claimants must show that their conduct conveys a particularized message, and the likelihood is great that the message will be understood by those who view it.[353]

The Court of Appeals determined the student's claim that she desires to wear clothes she feels good in does not meet the threshold of attempting to express a particular message. The court noted that in Tinker, the students wanted to convey their opposition to the war in Vietnam by wearing armbands.[354] In United States v. O'Brien,[355] the court held that the act of burning a draft card to protest the Vietnam War implicated the First Amendment, but could nonetheless be proscribed because the government had a substantial interest in prohibiting the burning of draft cards unrelated to the suppression of free expression. In Spence v. Washington, the Supreme Court held that a public university could not prevent a college student from hanging a flag with a peace sign upside down in his dormitory room window to express disappointment with the Cambodian incursion and the shootings at Kent State University.[356] In Texas v. Johnson,[357] the Supreme Court held that the First Amendment prohibited a state from punishing an individual for burning the American flag to protest the renomination of Ronald Reagan.

Under the traditional test for assessing restrictions on free expression, a regulation will be upheld if:

1. It is unrelated to the suppression of expression;

2. It furthers an important or substantial government interest; and

3. Does not burden substantially more speech than necessary to further the government interest.[358]

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[351] Id. at 385-86.
[352] Id. at 386.
[353] Id. at 388; citing, Spence v. Washington, 418 U.S. 405, 411, 94 S.Ct. 2727 (1974); Texas v. Johnson, 491 U.S. 397, 404, 109 S.Ct. 2533 (1989).
[354] Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 514, 89 S.Ct. 733 (1969).
[355] 391 U.S. 367, 382, 88 S.Ct. 1673 (1968).
[356] 418 U.S. 405, 415, 94 S.Ct. 2727 (1974).
[357] 491 U.S. 397, 399, 109 S.Ct. 2533 (1989).
[358] United States v. O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673 (1968).

The Court of Appeals concluded that the Blaus cannot satisfy the standard in O'Brien. First, the court found that the dress code's stated purpose is to create unity, strengthen school spirit and pride, and focus attention upon learning and away from distractions. Second, the dress code furthers important governmental interests, including bridging social economic gaps between families within the school district, focusing attention on learning, increasing school unity and pride, enhancing school safety, promoting good behavior, reducing discipline problems, improving test scores, improving children's self-respect and self-esteem, helping to eliminate stereotypes, and producing a cost savings for families.[359]

The Court of Appeals found that these were all important governmental interests, and even though Highlands Middle School was a high-achieving school with some of the top test scores in the state, and the school had few discipline problems, that did not preclude Highlands Middle School from adopting a dress code. The court noted that even a high-achieving school has an interest in improving the educational environment further, and that the school district presented evidence to show that the dress code had improved the educational environment at the school according to declarations from teachers at the school.[360] The court also noted that students are free to dress as they wish outside of school, and that the students have other outlets of expression during school hours, such as writing for the school newspaper, joining extracurricular activities, expressing themselves through school assignments, and associating with students as they please. The court found that all three prongs of the O'Brien test were satisfied.[361]

## C. Printed Messages on Shirts

In Palmer v. Waxahachi Independent School District,[362] the Fifth Circuit Court of Appeals upheld a school district's student dress code prohibiting t-shirts and polo shirts with printed messages. The dress code policy made an exception for principal-approved messages for clubs and student organizations.

The plaintiff was a student at the high school who wore a shirt with "San Diego" written on it. The student was told that his shirt violated the district's dress code. The student then sought approval for t-shirts that had the message "John Edwards for President" and "Freedom of Speech" and the text of the First Amendment on the back. The district rejected all three of these t-shirts.[363]

The Court of Appeals held that the high school's dress code was content neutral and its purpose was to maintain an orderly and safe learning environment, increase the focus on instruction, promote safety and lifelong learning, and encourage professional and responsible dress for all students. The Court of Appeals held that the dress code did not violate the First Amendment.[364]

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[359] Blau v. Fort Thomas Public School District, 401 F.3d 381, 391 (6th Cir. 2005).
[360] Id. at 392.
[361] Id. at 392.
[362] 579 F.3d 502, 248 Ed.Law Rep. 579 (5th Cir. 2009).
[363] Id. at 505.
[364] Ibid.

The Court of Appeals relied on prior decisions in Canady v. Bossier Parish School Board[365] and United States v. O'Brien[366] in which both decisions held that content neutral regulations are subject to an intermediate standard of review. Under O'Brien, a uniform policy will pass constitutional scrutiny if:

1. It furthers an important or substantial government interest;

2. The interest is unrelated to the suppression of student expression; and

3. The incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest.[367]

## D. School Uniforms

In Jacobs v. Clark County School District,[368] the Court of Appeals upheld the Clark County School District's school uniform policies. The court held that the school uniform policy did not violate the First Amendment.

In 2003, the Clark County School District adopted regulations which created a standard dress code for all Clark County students and established a means by which individual schools in the district could establish more stringent mandatory school uniform policies. These uniform policies were established for the purpose of increasing student achievement, promoting safety, and enhancing a positive school environment.[369]

Liberty High School instituted a mandatory school uniform policy requiring all students to wear solid khaki colored bottoms and solid colored polo, tee, or button down shirts (blue, red or white) with or without Liberty logos. Kimberly Jacobs, an eleventh grader at Liberty High School, repeatedly violated Liberty's uniform policy by wearing a shirt containing a printed message reflecting her religious beliefs. As a result of these violations, Kimberly Jacobs was repeatedly referred to the dean's office and was ultimately suspended from school five times for a total of approximately 25 days. Although Liberty provided Jacobs with educational services during her suspensions and her grade point average improved, Jacobs claimed that she missed out on classroom interactions, suffered reputational damage among her teachers and peers, had a tarnished disciplinary record, and was unconstitutionally deprived of her First Amendment rights to free expression and free exercise of religion because of Liberty's enforcement of its mandatory school uniform policy.[370] The parents of the student filed suit in U.S. District Court, and the U.S. District Court granted the school district's motion for summary judgment and the parents appealed.[371]

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[365] 240 F.3d 437, 440 (5th Cir. 2001).
[366] 391 U.S. 367, 88 S.Ct. 1673 (1968).
[367] Id. at 377.
[368] 526 F.3d 419, 232 Ed.Law Rep. 578 (9th Cir. 2008).
[369] Id. at 422.
[370] Id. at 423.
[371] Id. at 423-25.

The Court of Appeals held that an intermediate scrutiny standard should be applied, and the three categories of student speech, pure speech under Tinker, vulgar, lewd, obscene or offensive speech under Fraser, or school-sponsored speech under Kuhlmeier did not apply in the present case.[372] The Court of Appeals created a fourth category of student speech and based its use of intermediate scrutiny on the U.S. Supreme Court's decision in United States v. O'Brien.[373] In O'Brien, the Supreme Court held that with respect to content neutral restrictions on pure speech, the restrictions would be held if it furthers an important or substantial governmental interest, the governmental interest is unrelated to the suppression of free expression, and the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[374] The Court of Appeals stated:

> "It is thus our view that Tinker says nothing about how viewpoint-and content-neutral restrictions on student speech should be analyzed, thereby leaving room for a different level of scrutiny than that employed in either Bethel, Hazelwood, or Tinker when student speech is restricted on a viewpoint and content neutral basis."[375]

The Court of Appeals noted that their conclusion does not contradict Chandler, but recognizes there exists a fourth category of student speech that had not been explored prior to Chandler.[376]

The Court of Appeals noted that the school uniform policy's purpose was as follows:

1. Promoting safety by reducing the ability to hide weapons, drugs, or alcohol;

2. Allowing students and staff to focus more attention on student achievement;

3. Eliminating dress differences that emphasize different income levels;

4. Simplifying daily school preparation and maintenance for families.[377]

The Court of Appeals stated:

> "Applying intermediate scrutiny to school policies that effect content-neutral restrictions upon pure speech, or place limitations upon expressive conduct. . .not only strikes the correct balance

[372] Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 509 (1969); Bethel School District v. Fraser, 478 U.S. 675 (1986); Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988); Chandler v. McMinville School District, 978 F.2d 524 (9th Cir. 1992).
[373] 391 U.S. 367, 376-377 (1968).
[374] Id. at 376-377.
[375] Id. at 431-32, citing Canady v. Bossier Parish School Board, 240 F.3d 437 (5th Cir. 2001).
[376] Id. at 432, n. 28; citing Chandler v. McMinville School District, 978 F.2d 524 (9th Cir. 1992).
[377] Id. at 432.

> between students' expressive rights and schools' interest in furthering their educational missions, but as the Fifth Circuit explained, is entirely consistent with the Supreme Court's other school speech precedents, not to mention the remainder of the Court's First Amendment jurisprudence." [378]

The Court of Appeals then analyzed whether the school uniform policy complies with the criteria set forth in United States v. O'Brien. The Court of Appeals found that these school districts' stated goals unquestionably qualify as important governmental interests, bridging socio-economic gaps between the families within the school district, focusing attention on learning, increasing school unity and pride, enhancing school safety, promoting good behavior, reducing discipline problems, improving test scores, improving children's self-respect and self-esteem, helping to eliminate stereotypes, and producing a cost savings for families. The court noted, "Indeed, it is hard to think of a government interest more important than the interest in fostering conducive learning environments for our nation's children."[379]

The Court of Appeals also noted that the United States Department of Education has published a manual acknowledging the effectiveness of school uniforms in advancing student learning.[380] The Court of Appeals also noted that the district's regulations are unrelated to the suppression of free expression, which is the second prong of the O'Brien criteria. The court also found that the district's school uniform policies do not restrict more speech than necessary because students may continue to express themselves through other traditional methods of communication throughout the school day and may wear other clothing outside of school.[381] The Court of Appeals stated:

> "Wearing a uniform does not involve written or verbal expression of any kind . . . it is passive rather than active . . . and if it conveys a message at all, that message is imprecise, rather than particularized . . .
>
> "In sum, we conclude that none of plaintiff's speech-related rights were violated by the district's mandatory school uniform policies, and thus, summary judgment in defendant's favor on these claims was appropriate."[382]

The Court of Appeals also held that the school uniform policies did not violate the Free Exercise Clause of the First Amendment since they were valid and neutral laws of general applicability.[383] The court found that there was no evidence in the record suggesting that Liberty

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[378] Id. at 434; see, also, Canady v. Bossier Parish School Board, 240 F.3d 437, 442-443 (5th Cir. 2001).
[379] Id. at 435-36.
[380] Id. at 436; citing, U.S. Department of Education Manual on School Uniforms (1996).
[381] Id. at 437.
[382] Id. at 438.
[383] Id. at 439; citing, Employment Division, Oregon Department of Human Resources v. Smith, 494 U.S. 872, 879 (1990); Church of the Lukumi Babaluiaye, Inc. v. City of Hialeah, 508 U.S. 520, 531-532 (1993).

High School enacted its uniform policy because it disapproved of a particular religion or religion in general.[384]

In contrast, in Frudden v. Pilling,[385] the Ninth Circuit Court of Appeals held that a school district policy requiring students to wear a shirt that displayed the written motto, "Tomorrow's Leaders" may be unconstitutional in violation of the Free Speech Clause of the First Amendment. The Court of Appeals remanded the matter back to the United States District Court for further proceedings.

The Court of Appeals noted that in Jacobs v. Clark County School District,[386] the Court of Appeals upheld a public high school's mandatory uniform policy. Relying on Jacobs, the district court dismissed the plaintiffs' claims that the mandatory uniform policy at their children's public elementary school violated the First Amendment.

However, the Court of Appeals noted that the school uniform policy at Roy Gomm Elementary School differs in significant respects from the one found constitutional in Jacobs. The Court of Appeals noted that the Roy Gomm policy compels speech because it mandates that a written motto "Tomorrow's Leaders" be displayed on the shirt. In contrast, the uniforms in Jacobs consisted of plain-colored tops and bottoms without any expressive message. Second, unlike the content-neutral policy in Jacobs, the Roy Gomm policy contained a content based exemption for nationally recognized youth organizations, such as Boy Scouts or Girl Scouts, on regular meeting days.

The Court of Appeals stated that the right of freedom of speech protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.[387] In West Virginia Board of Education v. Barnette, the United States Supreme Court held that students cannot be compelled to recite the Pledge of Allegiance.[388]

In Wooley v. Maynard,[389] the United States Supreme Court struck down a New Hampshire statute requiring motorists to display license plates embossed with the state motto, "Live Free or Die."[390] The plaintiffs covered up the motto on their license plates because they considered the motto repugnant to their moral, religious, and political beliefs.[391]

The United States Supreme Court in Wooley held that "The statute violated the plaintiffs' First Amendment rights because it forces an individual, as part of their daily life, indeed constantly while his automobile is in public view, to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable."[392]

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[384] Id. at 439.
[385] 742 F.3d 1199, 302 Ed.Law Rep. 21 (9th Cir. 2014).
[386] 526 F.3d 419 (9th Cir. 2008).
[387] See, West Virginia Board of Education v. Barnette, 319 U.S. 624, 633-34 (1943) (students cannot be compelled to say the Pledge of Allegiance against their religious beliefs).
[388] Id. at 634.
[389] 430 U.S. 705 (1977).
[390] Id. at 717.
[391] Id. at 707-08.
[392] Id. at 715.

The plaintiffs in Frudden relied on Wooley and argued that the school's uniform policy violated their children's First Amendment rights because it compelled them to display the written motto, "Tomorrow's Leaders," on their shirts. The Court of Appeals noted that had the school uniforms consisted of plain-colored tops and bottoms, the uniform policy would have been constitutional. However, by mandating the written motto on the uniform shirts, the school policy compels speech. The Court of Appeals refused to analyze the message, "Tomorrow's Leaders" itself. The court held that examination of the ideological nature of the message is irrelevant.

The Court of Appeals concluded:

> "Because RGES compels students to endorse a particular viewpoint, strict scrutiny applies – that is, inclusion of the written motto on the RGES uniform shirts must be 'a narrowly tailored means of serving a compelling state interest.'"[393]

The Court of Appeals remanded the matter back to the lower court to determine if there was a compelling state interest that would justify requiring the written motto and the exemption in question. It will be very difficult, in our opinion, for the school district to articulate a compelling state interest given the Court of Appeals' analysis of the First Amendment issues.

As a result of the discussion in Frudden, districts should review their school uniform policies with legal counsel. If the district uniform policies require any type of written motto or message, the policy should be reviewed in light of the Frudden decision with legal counsel.

## E. Summary of Dress Code Cases

Based on the appellate decisions in Canady,[394] Blau,[395] Palmer,[396] and Jacobs,[397] the trend appears to be that the courts will dismiss constitutional challenges to school uniform policies and dress codes based on the free speech provisions of the First Amendment if the school district can show that the policy or regulation is unrelated to the suppression of free expression, furthers an important or substantial governmental interest, and does not substantially burden more speech than necessary to further a governmental interest.[398]

In summary, the appellate courts have upheld as constitutional content-neutral and viewpoint-neutral regulations such as school uniform policies and school dress codes. These decisions should be most helpful to school districts interested in developing school uniform policies or school dress codes for the purpose of improving school safety or improving the learning environment.

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[393] 742 F.3d 1199, 1207 (9th Cir. 2014).
[394] Canady v. Bossier Parish School Board, 240 F.3d 437 (5th Cir. 2001).
[395] Blau v. Fort Thomas Public School District, 401 F.3d 381 (6th Cir. 2005).
[396] Palmer v. Waxahachi Independent School District, 579 F.3d 502 (5th Cir. 2009).
[397] Jacobs v. Clark County School District, 526 F.3d 419 (9th Cir. 2008).
[398] With the exception of Frudden v. Pilling, where the school uniform policy required students to wear a uniform shirt that displayed the written motto, "Tomorrow's Leaders."

Based on these decisions, it should be difficult for students and parents to challenge school uniform policies and school dress codes in the future.